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Supreme Court, U.S.
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No. 02-834 NOV 27 2002

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In The

Supreme Court of the United States

JERICOL MINING INC. and
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

EUGENE NAPIER and DIRECTOR OF OFFICE WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG
Suite 500
800 Connecticut Ave., N.W.
Washington, D.C. 20006
202-553-2361

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED[1]

The decision below applies a *per se* rule requiring an administrative law judge to accord a treating doctor enhanced credibility in adjudicating claims for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("Act" or "BLBA"). The questions presented are:

a) Does the Sixth Circuit's treating physician rule violate sections 7(c) and 12 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 556(d), 559, section 21(b) and (c) of the Longshore Act ("LHWCA"), 33 U.S.C. §§ 921(b), (c), and this Court's law prohibiting *per se* rules exaggerating the weight that must be accorded certain evidence without a valid reason?

b) Is the Department of Labor's treating physician rule in 20 C.F.R. § 718.104(d) invalid as applied because it is arbitrary and capricious and not in accordance with law?

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[1] The questions presented here are identical to those presented in *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (U.S. Aug. 15, 2002) (No. 02-249) and *Gray v. Peabody Coal Co.*, 35 Fed. Appx. 138 (6th Cir. 2002) (unpublished), *petition for cert. filed*, 71 U.S.L.W. 3319 (U.S. Oct. 17, 2002) (No. 02-585). If the petition for a writ of certiorari is granted in *Groves* or *Gray*, it is respectfully requested that this case be consolidated with them for plenary review or, in the alternative, that it be held in abeyance pending the disposition of *Groves* and *Gray*.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner, Jericol Mining Inc., is a privately owned mining company. The petitioner, Old Republic Insurance Company is Jericol's insurer and a wholly owned subsidiary of Old Republic International, Corp. Respondent, Eugene Napier is a claimant for benefits under the BLBA. The Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the black lung benefits program and is a statutory party in black lung claims. 30 U.S.C. § 932(k).

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PETITION FOR WRIT OF CERTIORARI

Jericol Mining Inc. and the Old Republic Insurance Company (collectively "Jericol") respectfully petition for a writ of certiorari to review the judgment and opinion of The United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is published at 301 F.3d 703 (6th Cir. 2002). Appendix ("App.") 1.

The administrative decisions are unreported. These include:

1. The decision of the Administrative Law Judge ("ALJ") dated May 9, 1996, awarding benefits. App. 58.

2. The decision of the ALJ dated September 30, 1996, amending the award of benefits. App. 54.

3. The decision of the Benefits Review Board ("BRB"), U.S. Department of Labor, dated February 27, 1998, vacating in part and affirming in part. App. 42.

4. The decision of the ALJ on November 23, 1998, awarding benefits on remand. App. 30.

5. The decision of the BRB dated June 28, 2000, affirming the award of benefits on remand. App. 22.

6. The decision of the BRB dated December 21, 2000, denying reconsideration. App. 20.

JURISDICTION

The judgment of the Sixth Circuit was issued on August 30, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Section 7(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(d). App. 80.
2. Section 10(e) of the APA, 5 U.S.C. § 706. App. 80.
3. Section 19(d) of the Longshore and Harborworkers' Compensation Act ("LHWCA"), 33 U.S.C. § 919(d). App. 81.
4. Section 21(c) of the LHWCA, 33 U.S.C. § 921(c). App. 82.
5. 20 C.F.R. § 718.104(d) (2002). App. 83.

STATEMENT OF THE CASE

A. Introduction

The Sixth Circuit applies a treating doctor rule in federal black lung benefits claims. This rule requires the

adjudicator to accord more weight to the opinion of a treating doctor. This rule has no scientific, medical or legal foundation and the court below has never articulated a rationale for the rule. It has the potential to control the outcome in thousands of black lung claims, without regard to the best reasoned, most expert and most reliable medical evidence. The rule trumps all the ordinary standards for the evaluation of conflicting medical evidence and makes substantial evidence review on appeal essentially impossible. According to the court below, reliance on the treating doctor constitutes substantial evidence in support of an award of benefits and little else matters.

At first glance, the Sixth Circuit's opinion here seems to retreat from the powerful rule applied in *Groves* and *Gray, supra*, n.1, but a closer examination reveals that the rule is applied differently but with no less force than in the other cases. This time, applying DOL's regulation at 20 C.F.R. § 718.104(d)(5), the Court reached the obvious conclusion that none of the criteria set forth in the Department of Labor's treating doctor regulation justifies the ALJ's absolute preference for the treating doctor. Nevertheless, the Court affirmed the award of benefits deeming it supported by substantial evidence. This simple finesse overlooks the fact that the ALJ relied principally on the status of the treating doctors and accorded their opinions more weight. App. 35, 38. The Sixth Circuit's opinion here validates Professor Davis's observation that: "The treating physician rule is totally inconsistent with the substantial evidence test." Davis & Pierce, *Administrative Law Treatise* § 11.3 at 199 (3d ed. 1994).

In *Groves*, this Court is asked to review the validity of the Sixth Circuit's rule. There, the court of appeals reaffirmed its commitment to a treating doctor rule and

announced that it would apply the rule in keeping with a new regulation published by the Department of Labor ("DOL"). The new regulation articulates DOL's version of a treating doctor rule adopted by the agency for evidence developed after January 19, 2001. 20 C.F.R. § 718.104(d). The DOL rule, like the Sixth Circuit's rule, is supported by nothing and is criticized by all relevant commentary received into the rulemaking record by the agency. *See* Petition for a Writ of Certiorari, *Groves*, 277 F.3d 829 ("Groves Petition") at 19-22.[2]

Some version of the treating doctor rule is being applied now by ALJs in the adjudication of claims arising in the Sixth Circuit. There is no real defense to the rule when it is applied and it puts mine operators and their insurers in the position of having to accept undeniably unfair adjudication that makes the best evidence largely irrelevant where it conflicts with the treating doctor's opinion.

This Court's intervention is sought to preclude this injustice and to avert what is likely to become a litigation and insurance crisis for the black lung program.

B. Background

The BLBA is a federal workers' compensation law that provides benefits to coal miners and their families on account of total disability or death due to pneumoconiosis or "black lung" disease. *Pauley v. BethEnergy Mines, Inc.*,

[2] A copy of the *Groves* Petition has been served on the parties.

501 U.S. 680 (1991). The procedures for the adjudication of black lung claims are set forth in the LHWCA. *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 271 (1994); 33 U.S.C. §§ 919-922, *incorporated by reference into* 30 U.S.C. § 932(a). By virtue of this incorporation, the APA also applies in the adjudication of black lung claims. In *Greenwich Collieries*, this Court rejected the DOL's claim that the APA does not apply in black lung adjudications. *Id.*

In claims filed on or after July 1, 1973, and certain other claims subject to review by DOL under 30 U.S.C. § 945, benefits are paid by a mine operator, its insurance carrier, or if no responsible operator can be found, an entity called the Black Lung Disability Trust Fund. 30 U.S.C. §§ 932(a), 934.

Disputed claims are tried by an ALJ. Appeals from an ALJ's decision may be taken to DOL's BRB. The BRB conducts an appellate review to determine whether the ALJ's decision is supported by substantial evidence and in accordance with law. 33 U.S.C. § 921(b). Appeals from the BRB's decision may be taken as of right to the U.S. court of appeals with jurisdiction over the place where the miner worked for the employer. The court of appeals also conducts a substantial evidence review. *Id.* § 921(c).

The LHWCA prescribes no rules of evidence or treating doctor factor. It provides only that "common law or statutory rules of evidence or . . . technical or formal rules of procedure" do not apply except as set forth in the LHWCA and that the adjudicator "may make such investigation or inquiry or conduct such hearing in such a manner to best ascertain the rights of the parties." 33 U.S.C. § 923(a).

The BLBA incorporates these provisions. 30 U.S.C. § 932(a). The BLBA also requires the factfinder to consider all relevant medical evidence including a treating doctor's records as well as a list of other medical information. 30 U.S.C. § 923(b).

Rulemaking for the black lung program must be conducted in conformity with 5 U.S.C. § 553. 30 U.S.C. § 926(a). Rules adopted for the program are subject to review in accordance with the criteria set forth in 5 U.S.C. § 706.

C. Napier's Claim

Eugene Napier was awarded benefits by an ALJ in 1996. App. 58. The medical evidence conflicted and the ALJ credited the opinions of certain doctors partly because of their reasoning and documentation, partly because of their credentials, and partly because the treating doctor "had the best overall picture of the claimant's health." App. 73. The BRB vacated these findings because other equally or better credentialed doctors held contrary opinions that were at least as well reasoned and documented. App. 49. Several other findings were vacated because they were based upon an inaccurate statement of the record. App. 48, 50-51.

On remand, the ALJ again awarded benefits. This time, he held that two of the doctors had seen the miner several times and thus were in a better position to diagnose pneumoconiosis. The ALJ also gave "extra credibility" to the claimant's treating doctor. App. 35. The ALJ added that the treating and examining doctors' opinions also were supported by the medical evidence, although the

specific "evidence" that the ALJ had in mind was not identified.

This time, the BRB affirmed the award of benefits. Citing the Sixth Circuit's decision in *Tussey v. Island Creek Coal Co.*, 982 F.3d 1036 (6th Cir. 1993) (holding that treating physicians must be given more weight), the BRB noted that "the length of time a physician has treated a miner is an important factor in determining the value of the physician's opinion." The BRB observed also that the ALJ did not rely solely on the treating status of the doctors, but also found certain evidence outweighed. App. 26 and 28. The BRB's analysis fails to note that the ALJ found the rejected opinions "outweighed" because the credited physicians treated and examined the claimant.

Jericol and its carrier appealed to the Sixth Circuit and argued that the ALJ's substantial reliance on the treating and examining status of certain physicians artificially and illegally exaggerated the weight accorded to that evidence. In *Groves*, the Court of Appeals announced its intent to follow the new DOL regulation as a "guideline" for evaluating an ALJ's treating doctor preference. The regulation establishes five general criteria for applying the treating physician preference. *See* 20 C.F.R. § 718.204(d).[3] The court mentioned the criteria but did not apply them in *Groves* or in the cases that followed *Groves*.

[3] The criteria include: 1) nature of the relationship, 2) duration of the relationship, 3) frequency of treatment, 4) extent of treatment, and 5) the reasoning and documentation of the physician's report. There is no record that supports the first four. The fifth criterion applies to all expert testimony.

Wolf Creek Collieries v. Director, OWCP, 298 F.3d 511 (6th Cir. 2002); *Gray v. Peabody Coal Co.*, *supra* n.1.

Here, the court applied the DOL criteria and found that none of them justified according greater weight to the examining or treating doctors. The treating doctor's report was undocumented and unreasoned and the court so found. The court then announced a new intention of applying the same preference to other examining doctors, but found that the reports of the examining doctors provided no basis for crediting one over another. App. 13. The court of appeals then concluded that the ALJ erred in giving preferential weight to the treating and examining doctors in this case because the record revealed no basis for doing so.

Instead of remanding the case to the ALJ for a re-evaluation of the evidence, the court proceeded to conduct a substantial evidence review of the ALJ's findings. Since the ALJ's conclusions were predicated to a very substantial degree on treating and examining doctor preferences, it is not possible to explain the theory of the Sixth Circuit's analysis. There was no argument before the court suggesting that the ALJ's decision was unsupported by substantial evidence, except to the extent that there was no evidence justifying a treating or examining doctor preference.

The court of appeals finessed the ALJ's error by noting that the credibility of testimony is a matter for the ALJ, not the court of appeals, and that the award of benefits was properly affirmed because it was supported by substantial evidence. This circular reasoning characterizes all of the recent Sixth Circuit decisions addressing the treating doctor rule. There is, of course, no theory of appellate

review that excuses an error of law if the findings infected by the error are supported by substantial evidence. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998). The circularity of the court's reasoning simply proves the proposition that the treating doctor rule impedes or precludes normal substantial evidence review.

D. The Rulemaking

The history of the DOL rulemaking is set forth more fully in the *Groves* Petition at 9-12.

REASONS FOR GRANTING THE WRIT

1. The court below did not approve a treating doctor preference in this case and the case is, therefore, not the same as *Groves* and *Gray*. Here, the rule is applied to excuse the ALJ from any duty of reasoned decision-making that is required by the APA. The ALJ awarded benefits based upon a treating or examining physician preference and because the reports of the doctors were, at least to some degree, reasoned and documented by medical data. Other opinions in the record also are reasoned and documented by medical data. The treating doctor preference operates as a tie-breaker, of sorts, or the makeweight to elevate one body of evidence over another. That makeweight effect remains in force according to the court of appeals even though the treating doctor rule was not justifiably applied in light of the facts of the case. The result is simply illogical.

The treating doctor rule is no more appropriate as a tie-breaker or makeweight than it is as the absolute

mandate reflected in the Sixth Circuit's use of the rule in *Gray*. There is no support for using the rule as an absolute evidentiary preference and there is no support for using the rule as a tie-breaker or makeweight. This court's decision in *Greenwich Collieries*, 512 U.S. 267, precludes the use of the treating doctor preference as a tie-breaker because the effect of using the rule in this way shifts the burden of persuasion on the credibility of claimant's medical evidence from the claimant to the employer.

The Sixth Circuit's decision here cannot survive logical analysis. The treating doctor rule controls the outcome, yet the rule is deemed inapplicable. The court's substantial evidence review is a charade that masks the effect of the ALJ's improper reliance on the treating doctor by ignoring the fact that the preference played at least as significant a role in the ALJ's analysis of the evidence as did any reasoning and documentation that supported the treating and examining doctors' opinions. The court's theory is that if one plus one equals two, one plus zero also equals two.

2. This case should have been remanded to provide the ALJ with the opportunity to evaluate the evidence without relying on a treating doctor preference. The Sixth Circuit's approach now seems to rest on the notion that if the elephant in the room is painted the same color as the wall, no one will see it. Here, the treating doctor rule assumes an insidious presence that defies logic and substantial evidence review. This is simply a different but no less significant iteration of the court's original holding that the ALJ "must" give more weight to the treating doctor for no particular reason that the court is willing to articulate.

3. The Sixth Circuit's treating doctor rule, wherever it hides, is inconsistent with the rules applied in the Fourth and Seventh Circuits. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469-70 (7th Cir. 2001); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). It is an illegal, unsupported and unauthorized *per se* rule of evidence and it should be rejected by this Court.

4. For the reasons noted in the *Groves* Petition, the rule has the potential to cause great harm and it will have an economically devastating impact on employers who must defend black lung claims arising within the Sixth Circuit's jurisdiction. It is a cheater's rule that has no place in our body of law. It dishonors the integrity of the law.

CONCLUSION

For these reasons the Court should grant the petition for a writ of certiorari and hold this case in abeyance or consolidate it with *Groves*.

Respectfully Submitted,

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 533-2361

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 01-3156

JERICOL MINING, INC. and
OLD REPUBLIC INSURANCE
COMPANY,

Petitioner,

v.

EUGENE NAPIER and
DIRECTOR, OFFICE OF
WORKERS' COMPENSATION
PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of a Decision and Order
of the Benefits Review Board, United States
Department of Labor.
No. 99-0342 BLA.

Argued: August 7, 2002

Decided and Filed: August 30, 2002

Before: MOORE and GILMAN, Circuit Judges;
ROSEN, District Judge*

OPINION

RONALD LEE GILMAN, Circuit Judge. Eugene Napier filed a claim for benefits under the Black Lung

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

Benefits Act (BLBA) in March of 1993. An administrative law judge (ALJ) initially awarded Napier benefits, but the Department of Labor's Benefits Review Board (the Board) vacated the ALJ's order and remanded the case for further consideration. On remand, the ALJ once again issued an order awarding benefits to Napier. This time the Board affirmed the ALJ's determination. Jericol Mining, Inc., Napier's former employer, has appealed the Board's decision. For the reasons set forth below, we **AFFIRM** the decision of the Board.

I. BACKGROUND

Napier, who was born on June 6, 1949, began working as a coal miner in May of 1972 and continued to serve in that capacity for 20 years. He worked as a repairman and as a section foreman, and was exposed to coal dust on a daily basis. Before he stopped working in May of 1992, Napier was employed by Jericol as a repairman in a Kentucky mine. That position required him to perform a variety of strenuous physical activities, including bending, stooping, and heavy lifting.

Napier filed an application for benefits under the BLBA on March 9, 1993. During the administrative consideration of Napier's claim, Jericol was identified as the coal-mine operator that would be liable for the payment of any benefits (the responsible operator). The Department of Labor's (DOL) claims examiner denied Napier's request for benefits in August of 1993. Napier filed a motion with the Board for reconsideration, resulting in the reversal of the claims examiner's decision by the DOL's District Director. Jericol then requested review by an ALJ.

The ALJ issued a Decision and Order granting Napier's claim for benefits in May of 1996. In reaching his decision, the ALJ considered medical reports from six physicians who examined Napier at various points between May of 1992 and November of 1995. Four of these physicians – Dr. Glen Baker, Dr. Arthur Frank, Dr. N. Kabani, and Dr. J. D. Miller – reached a diagnosis of pneumoconiosis, but two others – Dr. Bruce Broudy and Dr. A. Dahhan – did not. The ALJ found the medical opinions of Dr. Baker, Dr. Frank, and Dr. Miller more persuasive than those of Dr. Broudy and Dr. Dahhan because the former physicians' conclusions were consistent with Napier's employment history and the purportedly positive x-ray readings that indicated pneumoconiosis, and because Dr. Baker and Dr. Miller are board-certified in internal medicine and pulmonary medicine. (Dr. Kabani's credibility was not assessed in the ALJ's initial Order and Decision.) In addition, the ALJ attached greater significance to Dr. Baker's opinions because the physician had examined Napier annually between 1992 and 1995.

The ALJ also determined that Napier was totally disabled, a finding that was based upon (1) the results of nine ventilatory studies and eight arterial blood gas studies, and (2) the medical opinions that Napier was unable to return to work as a coal miner. Finally, the ALJ concluded that Napier had established that his ailment was caused by exposure to coal dust. This last finding was based upon the reports of Dr. Baker and Dr. Frank. The ALJ identified February 1, 1994 as the commencement date for Napier's benefits.

Napier filed a motion for reconsideration, arguing that his benefits should begin on the date of his disability rather than in February of 1994. The ALJ agreed, and

issued an amended order in September of 1996 that changed the commencement date of Napier's benefits to June 1, 1992. This order also recognized that the initial decision erroneously stated that all of the arterial blood gas studies were "qualifying" for a finding of total disability. In fact, none of these studies supported Napier's claim. But the ALJ reaffirmed his determination that the pulmonary function studies and the preponderance of medical evidence supported a finding of total disability.

On appeal, the Board vacated the ALJ's decision and remanded the case for further consideration of three issues: (1) the diagnosis of pneumoconiosis, (2) the existence and cause of disability, and (3) the proper date for benefits to commence. The Board specifically instructed the ALJ to explain his findings regarding whether the x-rays supported a diagnosis of pneumoconiosis, noting that the initial order lacked any rationale for attributing greater weight to the positive readings, which supported a diagnosis of pneumoconiosis, than to the negative ones. In addition, the Board concluded that the ALJ's decision to discount the opinions of Dr. Broudy and Dr. Dahhan was irrational, because the ALJ's view was based upon the problematic analysis of the x-ray readings and a failure to recognize that all of the examining physicians considered Napier's 20 years of coal-mine employment.

With respect to whether Napier was totally disabled, the Board determined that the ALJ had neglected to consider all of the relevant evidence and had failed to explain the weight he accorded to the inconsistent opinions from the physicians. The ALJ was also instructed to reconsider whether, in light of all of the evidence, Napier's total disability was due to pneumoconiosis. Finally, with respect to the commencement date of benefits, the Board

directed the ALJ to explain the reason that he credited Dr. Baker's first report in June of 1992 as establishing total disability, thus serving as the basis for beginning benefits in that month.

The ALJ issued a Decision and Order on Remand in November of 1998. With respect to the x-rays, the ALJ found that this evidence did not establish pneumoconiosis, because the majority of the physicians who read the x-rays determined that they were negative. But the ALJ concluded that Napier had nevertheless presented substantial evidence of pneumoconiosis, relying upon four of the medical opinions. In particular, the ALJ found that Dr. Baker's opinion was entitled to greater weight than the views of Dr. Broudy and Dr. Dahhan because Dr. Baker had examined Napier on four separate occasions between June of 1992 and September of 1995, thereby giving him "extensive experience" with Napier's medical history. The ALJ also gave additional weight to Dr. Kabani's opinion because she was Napier's treating physician.

Pursuant to the Board's instructions, the ALJ next reconsidered the question of whether Napier had established that he was totally disabled. The ALJ determined that both the nine qualifying ventilatory studies and the medical opinion evidence supported a finding of a totally disabling respiratory impairment. In addition, the ALJ once again concluded that Napier established that his total disability was at least partly the result of his coal-mine employment. This conclusion is supported by the reports of Dr. Baker and Dr. Frank, whose opinions the ALJ believed were entitled to greater weight than those of Dr. Broudy and Dr. Dahhan. Finally, the ALJ reversed his position as to the commencement date for benefits by returning to February 1, 1994, the month in which Napier

requested a reconsideration of the DOL claims examiner's denial of his claim for benefits.

Jericol appealed the ALJ's Decision and Order on Remand, but the Board affirmed the award of benefits in June of 2000. The Board concluded that the ALJ's decision was supported by substantial evidence and contained no reversible error. It portrayed Jericol's objections to the ALJ's assessment of the medical opinions as a request to conduct a de novo review of the evidence, which the Board lacks the authority to do.

The Board subsequently denied Jericol's motion for reconsideration without comment in December of 2000. This timely appeal of the Board's Decision and Order followed.

II. ANALYSIS

A. Standard of review

We have a very narrow scope of review over the Board's decisions, which must be affirmed unless the Board has committed legal error or exceeded its scope of review of the ALJ's findings." *Peabody Coal Co. v. Groves*, 277 F.3d 829, 833 (6th Cir. 2002) (*Groves*). A similar highly deferential standard applies to the ALJ's analysis: "This court's role in reviewing an ALJ's decision is limited to determining whether substantial evidence supports the ALJ's conclusions." *Gray v. SLC Coal Co.*, 176 F.3d 382, 387 (6th Cir. 1999). As this court recently explained, "we will not reverse the conclusions of an ALJ that are supported by substantial evidence, even if the facts permit an alternative conclusion." *Groves*, 277 F.3d at 833 (internal quotation marks omitted). "Substantial evidence is such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). In accordance with these standards, "[w]e do not reweigh the evidence or substitute our judgment for that of the ALJ." *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 606 (6th Cir. 2001).

B. Requirements of a claim for benefits under the BLBA

The BLBA "provide[s] benefits . . . to coal miners who are totally disabled due to pneumoconiosis. . . . " 30 U.S.C. § 901(a). "In order to establish entitlement to benefits, a claimant must prove that: (1) he suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; and, (3) the pneumoconiosis is totally disabling." *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415-16 (6th Cir. 1997). The claimant has the burden of proving each of these requirements "by a preponderance of the evidence, except insofar as he is aided by a presumption." *Id.* at 416.

Pneumoconiosis is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). The defining characteristic of pneumoconiosis for the purpose of the BLBA is that its symptoms arise as a consequence of being exposed to dust while working in coal mines. 20 C.F.R. § 718.201(b) (explaining that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment"). "This legal definition of pneumoconiosis . . . encompasses a wider range of afflictions than does

the more restrictive medical definition of pneumoconiosis." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575 (6th Cir. 2000) (internal quotation marks omitted). A miner who has pneumoconiosis is "totally disabled" if the impairment "prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time." 30 U.S.C. § 902(f)(1)(A).

C. Presumptions based on treatment and frequency of examination

Jericol first argues that the ALJ improperly relied upon an automatic presumption that a physician's opinion is entitled to greater weight if that physician has treated the claimant. According to Jericol, such a "treating-physician presumption" is never appropriate. Jericol also insists that a presumption requiring an ALJ to defer to the opinions of a treating physician would violate the Administrative Procedure Act's (APA) emphasis on "reasoned decisionmaking in light of the record," because it would "relieve[] claimants of their burden of persuasion by automatically assuming that treating doctors' opinions are more persuasive without regard to the opinion itself or anything in the record."

This court recently addressed the issue of whether a treating physician's opinion is entitled to additional weight in *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002) (*Groves*). After recognizing that *Tussey v. Island Creek Coal Company*, 982 F.2d 1036 (6th Cir. 1993), "confirmed that the 'opinions of treating physicians are entitled to greater weight than those of non-treating physicians,'"

Groves rejected the contention that *Tussey* requires an ALJ to give absolute deference to the opinion of a treating physician. *Groves*, 277 F.3d at 834 (quoting *Tussey*, 982 F.2d at 1042) (refusing to accept Peabody Coal Company's argument that *Tussey* established a treating-physician presumption that is contrary to the requirements of the APA). Instead, *Groves* clarified that "*Tussey* requires ALJs in black lung cases to examine the medical opinions of treating physicians on their merits and to make a reasoned judgment about their credibility. These opinions should be '[g]iven their proper deference.'" *Id.* (quoting *Tussey*, 982 F.2d at 1042).

The factors discussed in 20 C.F.R. § 718.104(d)(5) are relevant for determining the appropriate weight that should be assigned to the opinions of treating physicians. *Wolf Creek Collieries v. Director, OWCP*, ___ F.3d ___, ___, 2002 WL 1769283, at *9 (6th Cir. 2002) (noting that this regulation is "instructive"); *Groves*, 277 F.3d at 834 (citing 20 C.F.R. § 718.104(d)(5) with approval). Although this regulation applies only to evidence developed after January 19, 2001, "it codifies judicial precedent and does not work a substantive change in the law." *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002) (holding that the treating-physician rule embodied in 20 C.F.R. § 718.104(d)(5) is not retroactive). The revised regulation, which establishes a treating-physician rule, provides that

> [i]n appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning

> and documentation, other relevant evidence and the record as a whole.

20 C.F.R. § 718.104(d)(5).

These considerations are not only consistent with the requirement that an ALJ's decision be based upon substantial evidence, but also are in line with the views of our sister circuits that have considered the relevance of a treating physician's opinion. *See Nat'l Mining Ass'n*, 292 F.3d at 861 ("The consensus among courts has been that an agency adjudicator may give weight to the treating physician's opinion when doing so makes sense in light of the evidence and the record, but may not mechanistically credit the treating physician solely because of his relationship with the claimant.") (citing *Groves* as well as cases from the Fourth and Seventh Circuits with approval). For these reasons, Jericol is mistaken both in its belief that an automatic treating-physician presumption exists and in its position that the opinion of a treating physician is never entitled to added weight.

Jericol also contends that the ALJ in the present case erroneously concluded that the physician who treated Napier (Dr. Kabani) and the physician who examined him multiple times (Dr. Baker) were by reason of these relationships more credible than the other physicians, without the ALJ giving proper consideration to their reasoning and other relevant evidence. According to Jericol, the record does not justify giving their opinions greater weight than the views of the other examining physicians.

With regard to the ALJ's reliance upon the opinions of Dr. Kabani, the only explanation given by the ALJ for attaching greater significance to her views was that she served as Napier's treating physician. Dr. Kabani began

seeing Napier in March of 1994, when she evaluated him for respiratory complaints. She saw him twice in that month, but did not see him again until five months later.

Although Dr. Kabani said that she continued to see Napier on subsequent occasions, the record is silent as to the factors that are relevant in determining whether her opinions as Napier's treating physician are entitled to greater weight, considerations such as the nature and duration of the relationship, as well as the frequency and extent of the treatment. 20 C.F.R. § 718.104(d) (instructing the ALJ to consider these factors "in weighing the opinion of the miner's treating physician"). Nor does the record contain the dates or results of any tests that Dr. Kabani performed. The absence of any documentation to support Dr. Kabani's views precludes the ALJ from relying upon her opinions. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (explaining that in making credibility determinations, the ALJ must "examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based") (footnote omitted).

For the above reasons, we conclude that the ALJ's decision to give extra weight to the opinion of Dr. Kabani, or even to rely upon her views, was inappropriate. *Cf. Groves*, 277 F.3d at 835 (concluding that the ALJ was justified in giving extra weight to the opinion of a physician who had treated the claimant for 25 years, a physician whose treatment notes and medical records were fully considered by the ALJ).

Turning to the ALJ's evaluation of Dr. Baker's opinions, the ALJ noted that Dr. Baker examined Napier four times – on June 17, 1992, May 6, 1993, March 9, 1994, and

September 6, 1995. The only other physician, aside from Dr. Kabani, who examined Napier more than once was Dr. Dahhan. Napier was seen twice by Dr. Dahhan, once on September 24, 1992 and again on November 27, 1995. Unlike Dr. Kabani, who actually treated Napier, both Dr. Baker and Dr. Dahhan were examining physicians. A treating physician sees a patient for the purpose of dealing with that individual's medical condition, whereas an examining physician in the BLBA context evaluates a coal miner's health in relation to that individual's claim for benefits. *See* Webster's Collegiate Dictionary, 10th ed., 403, 1258 (defining "treat" as "to care for or deal with medically or surgically" and "examine" as "to test the condition of"). We believe that the same factors that justify placing greater weight on the opinions of a treating physician are appropriate considerations in determining the weight to be given an examining physician's views.

Several of those factors – the nature and duration of the relationship, and the extent of the examinations – do not provide a basis for distinguishing Dr. Baker from Dr. Dahhan. Although Dr. Baker examined Napier on four occasions over four years, Dr. Dahhan saw Napier at both the beginning and the end of that same four-year period. The overall duration of Napier's relationship with these two physicians was therefore identical. As a result, Dr. Dahhan, like Dr. Baker, would have been able to observe any changes in Napier's conditions or any symptoms that might have been slow to emerge. The nature of Napier's relationship with these physicians was also indistinguishable, because both doctors acted as examining physicians.

Moreover, both physicians considered the same evidence in reaching their conclusions: Napier's employment history and smoking habits, his medical history, a

symptomatology, x-rays, physical examinations, blood gas studies, and pulmonary function studies. The only additional test performed by either physician was an EKG conducted by Dr. Dahhan. Thus, the extent of their examinations provides no basis for attaching greater significance to the opinion of Dr. Baker than to that of Dr. Dahhan.

The only difference between the relationships that these two physicians had with Napier is the frequency of the examinations. This factor was evidently significant in the ALJ's analysis, because he concluded that "Dr. Baker's extensive experience with Mr. Napier's medical history entitles his opinion to more weight."

The problem with the ALJ's analysis is that he did not specifically consider whether the four annual examinations by Dr. Baker were materially different from the two examinations that Dr. Dahhan performed during the same time frame. Moreover, nothing in the record supports a conclusion that Dr. Baker's additional examinations gave him a more thorough understanding of Napier's condition. Dr. Baker did not alter his views over the course of his examinations. Instead, Dr. Baker repeatedly diagnosed Napier as having (1) pneumoconiosis, based upon Napier's x-rays and the duration of his exposure to coal dust, (2) chronic obstructive airway disease with moderate ventilatory defect, based upon Napier's pulmonary function testing, and (3) chronic bronchitis, based upon Napier's medical history.

An important practical consideration also supports our conclusion that the ALJ erred in attributing greater weight to the opinion of Dr. Baker solely because he had examined Napier on an annual basis. Specifically, such an approach would enable claimants to "stack the deck" by

frequently visiting a physician who provided a favorable diagnosis, and then arguing that the opinion of that examining physician should automatically be accorded extra weight. We do not believe that such a "frequent examiner" presumption is consistent with the APA's requirement that the ALJ's decision be based upon substantial evidence.

For the above reasons, we conclude that the ALJ erred in attributing greater weight to the opinion of Dr. Baker simply because he saw Napier more frequently than the other examining physicians. Nevertheless, the ALJ was permitted to weigh the credibility of Dr. Baker in the same manner that he evaluated the credibility of the other medical opinions. The question of whether the ALJ's reliance upon Dr. Baker's views was appropriate in light of the entire record is an issue that we consider below.

D. Substantial evidence

Jericol's remaining argument is that the ALJ's reliance upon the opinions of Dr. Baker and Dr. Kabani was unreasonable. This position essentially challenges whether the ALJ's decision was based upon substantial evidence. Because Jericol focuses on the ALJ's conclusion that Napier has pneumoconiosis and is totally disabled, we will do the same.

The ALJ's determination that Napier has pneumoconiosis was based upon a finding of legal pneumoconiosis under 20 C.F.R. § 718.202(a)(4). That regulation provides that

> [a] determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a

> negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

20 C.F.R. § 718.202(a)(4).

In considering the requirements of this regulation, the ALJ noted that Dr. Baker, Dr. Frank, Dr. Kabani, and Dr. Miller had all expressed the opinion that Napier had pneumoconiosis. Dr. Broudy and Dr. Dahhan, in contrast, reached the opposite conclusion. The ALJ found all of these physicians to be highly qualified and their opinions to be well-reasoned. As the ALJ recognized, Dr. Baker, Dr. Broudy, Dr. Dahhan, and Dr. Frank were all board-certified in internal and pulmonary medicine.

The ALJ nevertheless made a credibility determination by finding that the opinions of Dr. Baker, Dr. Frank, Dr. Kabani, and Dr. Miller were more persuasive than those of Dr. Broudy and Dr. Dahhan. In particular, the ALJ explained that even though the x-ray evidence had been discredited, the first four physicians based their diagnoses on additional factors. Dr. Baker's opinion focused upon the connection between Napier's exposure to coal dust and his various ailments. The diagnosis of Dr. Frank emphasized a pulmonary function study. Dr. Kabani performed a spirometry that contributed to her diagnosis. Finally, Dr. Miller had relied upon pulmonary function

studies, Napier's medical history, and a physical examination in reaching his conclusion that Napier had pneumoconiosis.

But Jericol contends that the opinions of Dr. Baker and Dr. Kabani, and presumably the views of the other two physicians as well, were not documented and reasoned. As discussed above, we agree that the ALJ erred in relying upon Dr. Kabani's opinion due to the lack of supporting documentation. We therefore limit our discussion to the views of the other three physicians.

The basic flaw in Jericol's argument is that it fails to recognize that "[t]he determination as to whether [a physician's] report was sufficiently documented and reasoned is essentially a credibility matter. As such, it is for the factfinder to decide." *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). In making this determination, the ALJ must "examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Id* (footnote omitted).

The record in the present case supports the ALJ's determination to credit the opinions of Dr. Baker, Dr. Frank, and Dr. Miller. Not only did the ALJ discuss the studies that led these physicians to diagnose Napier with pneumoconiosis, but he also considered the contrary test results. Unlike Dr. Kabani, who did not provide any details of the tests that she performed, Dr. Baker, Dr. Frank, and Dr. Miller all gave the dates and results of the tests that they conducted. The ALJ's belief that the opinion of Dr. Baker was entitled to additional weight simply because of the physician's annual examinations of Napier, although erroneous, does not alter the fact that the ALJ

was entitled to find that other factors, based on the objective record, made Dr. Baker's views more credible than those of Dr. Broudy and Dr. Dahhan.

Jericol also argues that it was irrational for the ALJ to attach credibility to the views of Dr. Baker, Dr. Frank, and Dr. Miller after the ALJ concluded that, contrary to the opinions of these physicians, the x-rays did not support a finding of pneumoconiosis. This contention, however, overlooks the fact that these physicians' diagnoses were not based solely on the x-ray evidence. Similarly, Jericol's argument overlooks a claimant's ability to establish legal pneumoconiosis notwithstanding negative x-ray readings. 20 C.F.R. § 718.202(a)(4) (recognizing that legal pneumoconiosis does not require a positive x-ray reading). The ALJ's decision to disagree with their analyses of the x-rays, therefore, does not result in a complete refutation of these doctors' opinions.

In addition to challenging the ALJ's finding that Napier has pneumoconiosis, Jericol also argues that the ALJ's determination that Napier is totally disabled was not rational. The ALJ, however, concluded that the nine ventilatory studies were sufficient to establish total disability. Moreover, the ALJ discussed the medical opinion evidence, noting that four of the six physicians were of the opinion that Napier was totally disabled, that Dr. Broudy expressed his opinion that Napier might be totally disabled, and that Dr. Frank was silent on the issue. Based upon these considerations, the ALJ determined that the evidence supporting total disability outweighed the results of the arterial blood gas studies, which did not support a finding of total disability.

Jericol further contends that the ALJ's conclusion regarding total disability was flawed because the examining physicians' opinions did not reveal any knowledge of the requirements of Napier's usual coal-mine employment. In addition, Jericol argues that the ALJ failed to resolve conflicting evidence regarding the physical demands of Napier's work. Neither of these arguments has merit.

Contrary to Jericol's contention, Dr. Baker and Dr. Dahhan both recognized that Napier worked underground as a repairman. This position has a precise meaning in the context of coal mining, and the ALJ could rationally conclude that Dr. Baker and Dr. Dahhan understood the demands of working as a repairman. More importantly, Dr. Baker expressed his view that Napier's ailments prevent him from performing any work that requires physical exertion or exposure to coal dust. The ALJ's findings of fact reflect that Napier had worked as a repairman, where he was exposed to coal dust on a daily basis and had to perform heavy lifting. As a result, even if Dr. Baker, Dr. Dahhan, and Dr. Miller did not convey a precise knowledge of the demands of Napier's job, the ALJ could rationally conclude that an inability to perform physically demanding work and the need to avoid exposure to coal dust prevents Napier from working as a coal miner.

With respect to Jericol's contention that the ALJ failed to resolve conflicting evidence in the record as to the physical demands of Napier's work, the ALJ specifically found that Napier was "a very credible witness." Any discrepancy in the evidence regarding the nature of Napier's work was therefore implicitly resolved in his favor. The ALJ's failure to recognize any purported differences in the record on this issue was therefore harmless, if an error at all.

Jericol's central argument, when stripped to its essentials, appears to be a quarrel with the ALJ's credibility determinations. But this court is required to defer to the ALJ's assessment of the physicians' credibility. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002) ("Lacking the authority to make credibility determinations, we will defer to the ALJ's findings."). In light of the entire record, we conclude that the ALJ's findings were based upon substantial evidence and therefore should be affirmed.

III. CONCLUSION

This appeal, like many black-lung benefit cases, admittedly presents a close case. On balance, however, we conclude that the ALJ's findings are supported by substantial evidence that Napier satisfied the requirements necessary to receive benefits under the BLBA. We therefore **AFFIRM** the decision of the Board.

U.S. Department of Labor
Benefits Review Board
P. O. Box 37601
Washington, DC 20013-7601

[SEAL]

BRB No. 99-0342 BLA

EUGENE NAPIER Claimant-Respondent v. JERICOL MINING, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	NOT-PUBLISHED DATE ISSUED: DEC 21, 2000 ORDER ON MOTION FOR RECONSIDERATION

As no member of the panel has affirmatively voted to vacate or modify the decision herein, the motion for reconsideration filed by employer DENIED. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b), 802.407(a), 802.409.[1]

[1] Further review of the disposition of the instant case may be obtained by appeal to the United States Court of Appeals of the appropriate circuit.

By Order of the Board:

s/ _____
Thomas O. Shepherd, Jr.
Clerk of the Board

U.S. Department of Labor

Benefits Review Board
P. O. Box 37601
Washington, DC 20013-7601
[SEAL]

BRB No. 99-0342 BLA

EUGENE NAPIER Claimant-Respondent v. JERICOL MINING, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	NOT-PUBLISHED DATE ISSUED: JUN 28, 2000 DECISION AND ORDER

Appeal of the Decision and Order on Remand of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Douglass Law Office), Harlan, Kentucky, for claimant.

Richard A. Dean (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-1170) of Administrative Law Judge Rudolf L. Jansen awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case has been before the Board previously.[1] In the original Decision and Order, the administrative law judge found twenty years of coal mine employment and that modification was established pursuant to 20 C.F.R. §725.310. Administrative Law Judge Decision and Order dated May 9, 1996. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203 and 718.204(b), (c). Accordingly, benefits were awarded. Employer appealed and the Board affirmed the administrative law judge's modification finding but vacated his findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.204(b), (c)(4) as well as his onset determination and remanded the case for further consideration. *See Napier v.*

[1] Claimant filed his application for benefits on March 8, 1993, which was denied by the district director on August 9, 1993. Director's Exhibits 1, 25; Administrative Law Judge Decision and Order dated May 9, 1996. Claimant requested modification on February 8, 1994. Director's Exhibit 32.

Jericol Mining, Inc., BRB No. 97-0291 BLA (February 27, 1998) (unpublished).

On remand, the administrative law judge concluded that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Decision and Order on Remand at 3-6. Accordingly, benefits were awarded beginning February 1, 1994, the month in which modification of the claim was filed. In the instant appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), that claimant established total disability pursuant to Section 718.204(c)(4) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R.

§§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Initially, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) as he impermissibly accorded less weight to the opinions of Drs. Broudy and Dahhan and greater weight to the opinions of Drs. Baker and Kabani. Employer argues that the administrative law judge mechanically applied the treating physician preference as his decision was based only on the status of the physicians. Employer's Brief at 15-21. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988).

In the instant case, the administrative law judge, within his discretion as fact-finder, permissibly determined that the report of Dr. Kabani was entitled to extra credibility on the basis that she was claimant's treating physician and that Dr. Baker's opinions were entitled to more weight than the opinions of Drs. Broudy and Dahhan due to the physician's extensive experience with claimant's medical history based on his examination of claimant on more than one occasion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States*

Steel Corp., 8 BLR 1-46 (1985); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order on Remand at 4; Director's Exhibits 16, 17, 45, 53, 72, 73; Claimant's Exhibit 2; Employer's Exhibit 2. Contrary to employer's contention, the administrative law judge rationally accorded more weight to the opinions of Drs. Baker and Kabani as the length of time a physician has treated a miner is an important factor in determining the value of the physician's opinion because of the correlative degree of the physician's familiarity with the patient. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Moreover, contrary to employer's contention, the administrative law judge did not find the existence of pneumoconiosis establish [sic] pursuant to Section 718.202(a)(4) based solely on the status of the physicians but permissibly found the opinions of Drs. Broudy and Dahhan outweighed by the preponderance of the remaining medical opinions of record. Decision and Order on Remand at 4; Director's Exhibits 15, 16, 17, 45, 46, 53, 72, 73; Employer's Exhibit 2; Claimant's Exhibit 2; *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8 (1996); *Trumbo v. Reading Anthracite Company*, 17 BLR 1-85 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We therefore affirm the administrative law judge's finding that the evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to Section 718.204(c)(4).

We disagree. The administrative law judge discussed the medical opinions of record and rationally found that Dr. Frank did not address disability, that Dr. Broudy stated that the miner "may" not be able to return to work, that Dr. Dahhan initially opined that the miner was not disabled but in a subsequent opinion stated that claimant does not retain the ability to perform his regular coal mine employment and that the remaining opinions of Drs. Baker, Miller and Kabani are unequivocal in stating that claimant is totally disabled. Decision and Order on Remand at 5; Director's Exhibits 15, 16, 17, 45, 46, 53, 72, 73; Employer's Exhibit 2; Claimant's Exhibit 2. Contrary to employer's contentions, the administrative law judge was aware of the exertional requirements of claimant's coal mine employment. The administrative law judge found that claimant's last coal mine employment for the last year was as a repairman and that the exertional requirements of this job were heavy. Decision and Order dated May 9, 1996; Decision and Order on Remand at 5. Additionally, four of the five physicians who addressed the issue of claimant's total disability specifically noted that claimant's last coal mine employment was as a repairman. Director's Exhibits 15, 16, 17, 45, 53, 72, 73; Employer's Exhibit 2; Claimant's Exhibit 2. Thus the administrative law judge reasonably found that the medical opinion evidence was sufficient to establish total disability pursuant to Section 718.204(c)(4). Decision and Order on Remand at 5; *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry, supra*; *Piccin, supra*. Furthermore, the administrative law judge noted the existence of contrary probative evidence in the record, but permissibly concluded that this evidence did not outweigh the evidence supportive of a total disability finding. *See Clark, supra*; *Shedlock v. Bethlehem Mines*

Corp., 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order on Remand at 5. Consequently, inasmuch as the administrative law judge permissibly found that the pulmonary function study evidence and the medical opinions of record were sufficient to establish total respiratory disability upon weighing all of the relevant evidence, we affirm the administrative law judge's finding of total disability pursuant to Section 718.204(c). See *Clark, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock, supra*; *Gee, supra*.

Employer further asserts that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) in that he failed to accord appropriate weight to the opinions of Drs. Broudy and Dahhan. Employer contends that the administrative law judge erred in according greater weight to Dr. Baker's opinion based on the treating physician preference. Contrary to employer's contentions, the administrative law judge permissibly relied on Dr. Baker's opinion as the physician had an extensive history of examining the miner as well as the physician's opinion was supported by the medical evidence of record. Decision and Order on Remand at 6; *Tussey, supra*; *Onderko, supra*; *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King, supra*; *Wetzel, supra*; *Lucostic, supra*; *Revnack, supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Piccin, supra*. Additionally, the administrative law judge rationally accorded less weight to the opinions of Drs. Broudy and Dahhan as they were not consistent with the medical evidence of record because an administrative law judge may permissibly accord less weight to an opinion regarding causation where it is based on a faulty underlying premise regarding the presence or absence of

pneumoconiosis. Decision and Order on Remand at 6; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the medical opinions of record establish causation pursuant to Section 718.204(b) and the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

s/ _____
JAMES F. BROWN
Administrative Appeals Judge

s/ _____
REGINA C. McGRANERY
Administrative Appeals Judge

s/ _____
MALCOLM D. NELSON, Acting
Administrative Appeals Judge

U.S. Department of Labor [SEAL]

Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, OH 45202

Telephone: (513) 684-3252
Facsimile: (513) 684-6108

Date Issued: November 23, 1998

Case No: 95-BLA-1170

In the Matter of

EUGENE NAPIER

Claimant

v.

JERICOL MINING, INC.

Employer

OLD REPUBLIC INSURANCE COMPANY

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER ON REMAND AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act,

benefits are awarded to coal miners who are totally disabled due to pneumoconiosis.

On May 9, 1996, I issued a Decision and Order Awarding Benefits. On September 30, 1996 I issued an Order on Motion for Reconsideration, changing the onset date of disability. In the decision awarding benefits, I determined that Claimant had established the existence of pneumoconiosis pursuant to sections 718 .202(a)(1) and 718.202(a)(4). I also found that the evidence established total disability pursuant to section 718.204(c) and total disability due to pneumoconiosis pursuant to section 718.204(b).

The Employer appealed, and, in a Decision and Order dated February 27, 1998, the Benefits Review Board affirmed in part, vacated in part, and remanded the case for further consideration. In its decision, the Board ordered that I reconsider whether the miner has established pneumoconiosis. The Board instructed me to review my finding that the x-ray evidence established pneumoconiosis pursuant to section 718.202(a)(1). Specifically, I must address the relative weights I assigned to the opinions of the readers of the March 9, 1994, September 1, 1994, September 6, 1995, and November 27, 1995 x-rays. The Board instructed me to explain my conclusion that the positive readings of these x-rays were more persuasive than the negative readings. To the extent the weighing of medical opinion evidence relied on being bolstered by the vacated x-ray results, the Board instructed me to reconsider the finding of pneumoconiosis under 718.202(a)(4). Additionally, the Board stated that Drs. Broudy and Dahhan were board certified in internal and pulmonary medicine and relied on the same number of years of coal mine employment as the other doctors and thus, their opinions were not entitled to less weight on these bases.

In vacating my finding that Claimant is totally disabled pursuant to section 718.204(c), the Board ordered that I consider that Dr. Dahhan changed his opinion regarding this issue from one of no total disability to one of total disability. Additionally, the Board pointed out that Dr. Frank did not find the miner to be totally disabled and that Dr. Broudy said only that the disease "may" prevent the claimant from working as a miner. Additionally, as I noted in my order of September 30, 1996, the Board stated that all of the miner's arterial blood gas studies were nonqualifying.

The Board also remanded the case on the issue of whether total disability was caused by pneumoconiosis. The Board stated that Dr. Frank did not attribute the miner's disability to pneumoconiosis but rather, was silent on this issue. The Board also found that the opinions of Drs. Baker and Frank were in fact not bolstered by the arterial blood gas studies, since all of the values were nonqualifying.

Last, the Board addressed my determination of the onset date of the claimant's disability. The Board rejected the employer's contention that ~~I~~ cannot rely on a doctor's opinion for the onset of total disability in a modification when I rejected that opinion earlier. The Board did however instruct me to fully explain my decision to credit Dr. Baker's 1992 report as establishing disability.

The Findings of Fact and Conclusions of Law contained in the previous Decisions and Orders are adopted herein except to the extent that they are inconsistent with this decision or to the extent that they were found erroneous by the Benefits Review Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pneumoconiosis

Section 718.202(a)(1)

In the previous Decisions and Orders, I found that the x-ray evidence established pneumoconiosis pursuant to § 718.201(a)(1) The March 9, 1994 x-ray was read as negative by two doctors who were dually qualified as "B" readers and board certified radiologists and one who was qualified as a "B" reader. This same x-ray was read as positive by one dually qualified doctor and one "B" reader. The September 1, 1994 x-ray was read as negative by two dually qualified doctors. It was read as positive by one dually qualified doctor and one "B" reader. The September 6, 1995 x-ray was read as positive by one "B" reader. The November 27, 1995 x-ray was read as negative by one dually qualified doctor and one "B" reader.

Upon reconsideration of this evidence and additional reflection, I find that the x-ray evidence does not establish pneumoconiosis pursuant to 718.202(a)(4). Five dually qualified physicians read the x-ray evidence as negative. Only two dually qualified physicians read this evidence as positive. Two "B" readers read the x-ray evidence as negative. Three "B" readers read the x-ray evidence as positive. Because the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence fails to support a finding of pneumoconiosis. The claimant always has the burden of proving each element of his claim by a preponderance of the evidence and I must find that he has failed to do so here. Recency does not help the Claimant either. Throughout the entire history of the case, there are both negative and positive readings of the x-ray

evidence. This pattern did not change for the more recent x-rays.

Section 718.202(a)(4)

In my previous Decisions and Orders, I evaluated the medical opinion evidence and concluded that Claimant also established pneumoconiosis pursuant to section 718.202(a)(4). I found all of the physicians to be highly qualified and all of their opinions to be well reasoned. Drs. Miller, Baker, Frank, and Kabani opined that the claimant had pneumoconiosis while Drs. Broudy and Dahhan opined that he did not. The Board stated that I accurately summarized the six opinions of record. I accorded more weight to Dr. Baker on the basis that he had examined the Claimant from 1992 to 1995 and thus, had the greatest familiarity with Mr. Napier's condition. I accorded greater weight to Drs. Baker and Frank based on their board certifications in internal and pulmonary medicine. I found the opinions of Drs. Broudy and Dahhan to be contradicted by the x-ray evidence and the extensive coal mine experience of the claimant. On remand, the Board ordered that the opinions of Drs. Baker and Frank were not entitled to more weight than those of Drs. Broudy and Dahhan based on board certification, since Drs. Broudy and Dahhan were equally qualified in this respect. The Board also ruled that the opinions of Drs. Broudy and Dahhan could not be discredited on the basis of length of coal mine experience since they relied on the same amount of coal mine experience as the other experts. Additionally, the Board reversed on the medical opinion evidence issue to the extent that my previous Decision and Order relied on this evidence being bolstered by my finding that the x-ray evidence was positive for pneumoconiosis.

Upon further review, I continue to find that the evidence establishes the existence of pneumoconiosis under section 718.202(a)(4). Although Drs. Broudy and Dahhan are as equally qualified as Drs. Baker and Frank in terms of board certification in pulmonary and internal medicine, they do not have the extensive history with Mr. Napier that Dr. Baker possesses. Although Drs. Broudy and Dahhan did use the correct coal mine history, it is my opinion that Dr. Baker's extensive experience with Mr. Napier's medical history entitles his opinion to more weight. I also lend extra credibility to Dr. Kabani since she was Mr. Napier's treating physician. (Tr. 17) Although I now view the x-ray evidence as being negative for pneumoconiosis, this was not the only basis for the opinions of Drs. Miller, Baker, Frank, and Kabani. *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-8 (1996). Dr. Miller's opinion was based on pulmonary function studies, history, and a physical exam in addition to x-rays. (DX 15) Dr. Baker's opinion was based on exposure history in addition to x-rays. (DX 17, 53, and 73) Dr. Frank's opinion was based in part on a pulmonary function study. Dr. Kabani's opinion was based on spirometry in addition to x-ray evidence. (DX 46 and 72). In reweighing all of this evidence, I continue to find that Claimant has established the existence of pneumoconiosis pursuant to section 718.202(a)(4).

Total Disability

In the previous Decisions and Orders, I found that the evidence established total respiratory disability pursuant to section 718.204(c). Specifically, I determined that the

pulmonary function study evidence, arterial blood gas study evidence, and medical opinion evidence was sufficient to establish total disability.[1] In the order of remand, the Board instructed that I weigh all the evidence both like and unlike together. In particular, the Board instructed that I consider that the results of the arterial blood gas studies were non-qualifying and that Dr. Frank was silent on the issue of total disability. Additionally, the Board stated that Dr. Broudy only stated that the impairment *may* prevent the miner from doing underground coal mine work. (emphasis added) The Board also ordered that I discuss the fact that Dr. Dahhan initially opined that Mr. Napier could perform his usual coal mine work, but later wrote that he was totally disabled.

Under Sections 718.204(c)(1) and (c)(2), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies.[2] All of the nine ventilatory studies are qualifying, but none of the eight arterial blood gas study values are qualifying pursuant to §§ 718.204(c)(1) and (c)(2). Therefore, I find that the Claimant has established total disability pursuant to 718.204(c)(1), but not 718.204(c)(2).

With regard to the medical opinion evidence under 718.204(c)(4), I now find that Dr. Frank was silent with

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[1] On reconsideration on September 30, 1996, I recognized that the arterial blood gas studies were non-qualifying.

[2] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(c)(1) and (c)(2). A "non-qualifying" test produces results that exceed the table values.

respect to total disability, Dr. Broudy said that the miner "may" not be able to return to his regular coal mine work, and that Dr. Dahhan initially opined that Mr. Napier could continue his work, but later stated that he was totally disabled. I continue to find that the other three examining physicians were unequivocal in their opinions that Mr. Napier was totally disabled due to respiratory impairment. With respect to Mr. Dahhan's opinions, the passage of time provides a viable explanation for the discrepancy. Dr. Dahhan opined that Mr. Napier was totally disabled over three years after he opined to the contrary. I find it reasonable to believe that Dr. Dahhan simply felt that Mr. Napier's condition had worsened in this period of time. Thus, I find four doctors who state that Mr. Napier is totally disabled, one doctor who states that he may be totally disabled and one who was silent on the issue. I continue to find that the medical opinion evidence supports a finding of a totally disabling respiratory impairment.

Weighing all the contrary probative evidence, I find that Claimant has established the existence of total respiratory disability. In making this finding, I note that Claimant's last coal mine job included heavy lifting. (Tr. 14) Although the arterial blood gas studies do not support a finding of total respiratory disability, the pulmonary function study evidence and medical opinion evidence both support such a finding. Accordingly, I find that Claimant has established the existence of a totally disabling respiratory impairment pursuant to section 718.204(c).

Total Disability due to Pneumoconiosis

In the previous Decisions and Orders, I found that the evidence was sufficient to establish that Claimant's disability was due to pneumoconiosis pursuant to section 718.204(b). In vacating this finding, the Board determined that I incorrectly found Dr. Frank's opinion to attribute pneumoconiosis to coal mine employment. The Board stated that Dr. Frank was actually silent on the matter. The Board also instructed that I reconsider my opinion on the credibility of Drs. Baker and Frank to the extent that I found them to be bolstered by the results of the arterial blood gas studies which the Board has now found to be non-qualifying.

Dr. Baker wrote that the miner's disability was due to pneumoconiosis and smoking. Dr. Frank attributed the total disability to pneumoconiosis. None of the other physicians ascribed a cause to the disability, but it is inferrable that Drs. Broudy and Dahhan attributed it to a pulmonary problem other than pneumoconiosis.

I place greater weight on the opinion of Dr. Baker since he has an extensive history of examining Mr. Napier. I also continue to find that the opinions of Drs. Baker and Napier [sic] are supported by the medical evidence. I found that pneumoconiosis was established by the medical opinion evidence. I likewise found that total disability was established by the pulmonary function studies and the medical opinion evidence. I place less weight on the opinions of Drs. Broudy and Dahhan whose opinions are not consistent with the weight of the objective medical evidence. Accordingly, I continue to find that the claimant has established that his total disability arose, at least in part, out of his coal mine employment.

Onset Date of Disability

Finally, the Board ordered that I fully explain my onset date finding. In particular the Board stated that I must explain why I chose to credit Dr. Baker's report which set the onset date as June 1, 1992. The Board rejected the employer's contention that it was improper for me to credit Dr. Baker's report when it was initially rejected and reiterated that a modification hearing is a *de novo* proceeding.

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits begin with the month during which the claim was filed. 20 C.F.R. § 725.503(b). In my Order on Motion for Reconsideration, I credited Dr. Baker's initial finding of total disability in June, 1992 as revealing the correct onset date since this was the month of the first qualifying pulmonary function study. I note however, that pulmonary function studies revealed total disability from June, 1992 through November, 1995. I note a similar span of time for medical opinion evidence regarding total disability. Although this evidence reveals that on certain dates Mr. Napier was totally disabled, it does not reveal on which date total disability began. *Tobrey v. Director, OWCP*, 12 B.L.R. 1-181, 1-183 (1989). The claimant bears the burden of proof in establishing the date of total disability. *See eg., Johnson v. Director, OWCP*, 1 B.L.R. 1-600 (1978). Based upon further review of the record, I cannot determine the month that Claimant became totally disabled due to pneumoconiosis. Consequently, Claimant shall receive benefits commencing February 1, 1994, the month during which this claim was filed.

ORDER

The Employer, Jericol Mining, Inc., is ORDERED to pay:

1. To the Claimant, all benefits to which he is entitled under the act augmented by reason of his four dependents, commencing February 1, 1994.

2. To the Claimant, all medical and hospitalization benefits to which he is entitled to [sic] commencing February 1, 1994, or otherwise provide for such service.

3. To the secretary of Labor, reimbursement for any payment the Secretary has made to the Claimant under the Act and to deduct such amounts, as appropriate, from the amount the employer is ordered to pay under paragraphs (1) and (2) above.

4. To the Claimant or to the Black Lung Disability Trust Fund, as appropriate, interest at the rate established by Section 6621 of the Internal Revenue Code of 1854. Interest is to accrue thirty days from the date of the initial determination of the District Director's award. *See Youghiogheny Ohio Coal Co. v. Warren*, 841 F.2d 134 (6th Cir. 1988).

s/_____
RUDOLF L. JANSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice

of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2605, Washington, D.C. 20210.

U.S. Department of Labor

Benefits Review Board
P. O. Box 37601
Washington, DC 20013-7601

[SEAL]

BRB No. 97-0291BLA
OWCP No. 400-70-2405

EUGENE NAPIER Claimant-Respondent v. JERICOL MINING, INC., and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	NOT-PUBLISHED DATE ISSUED: 02/27/1998 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits and Order on Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Nora J. Clark (Douglass Law Office), Harlan, Kentucky, for claimant.

Karen Rapaport Esser (Arter & Hadden), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order on Motion for Reconsideration (95-BLA-1170) of Administrative Law Judge Rudolf L. Jansen on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. The administrative law judge found that the evidence was sufficient to establish 20 years of qualifying coal mine employment, and that claimant had four dependents for purposes of augmentation. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4); 718.203, and total respiratory disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §725.310 and awarded benefits with an onset date for the commencement of benefits of February 1994. Following claimant's motion for reconsideration, the administrative law judge revised the onset date to June 1, 1992.

On appeal, employer contends that the administrative law judge erred by failing to make the requisite finding as to whether the evidence established a change in conditions pursuant to Section 725.310 prior to considering the merits of the claim. Employer also asserts that the administrative law judge erred when he found that the evidence

established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). Employer further challenges the administrative law judge's finding that the evidence establishes total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Employer also challenges the administrative law judge's determination on reconsideration in regard to the onset date of entitlement. Employer argues that it is irrational for the administrative law judge to award benefits prior to the date upon which modification was sought, as the previous evidence was already considered, and rejected. Claimant, in response, asserts that the administrative law judge's findings that the evidence establishes entitlement are supported by substantial evidence, and accordingly, he urges affirmance of the administrative law judge's award of benefits beginning on June 1, 1992. The Director, Office of Workers' Compensation Programs (the Director), in response, asserts that employer's position regarding modification is incorrect, and that no preliminary inquiry is necessary. The Director takes no position with respect to the merits. Employer replies, asserting that both opposing parties' position with respect to modification is supported only by *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), but that it was effective [sic] overruled by the United States Supreme Court's holding in *Director, OWCP v. Greenwich Collieries (Ondecko)*, 114 S.Ct. 2251, 18 BLR 2A-1(1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) because the Court held that claimant must prove all of the essential elements of entitlement by a

preponderance of evidence. Employer repeats its earlier contentions regarding the merits, generally.[1]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge erred when he proceeded directly to the merits in this modification case. The Director, in response, asserts that no preliminary finding is required. We agree. The Board has held that, in cases involving modifications pursuant to Section 725.310, the administrative law judge must determine whether claimant has demonstrated a mistake in a determination of fact or if the evidence establishes a change in conditions. The administrative law judge is obligated to make an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the newly submitted evidence is sufficient to establish the element or elements of entitlement which

[1] Inasmuch as no party has challenged the administrative law judge's findings that claimant established 20 years of qualifying coal mine employment, that claimant has four dependents for purposes of augmentation should benefits be awarded, that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3), but if established, arose out of coal mine employment pursuant to Section 718.203(b), these findings are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR*, 14 BLR 1-156 (1990), *modified on recon.* 16 BLR 1-71 (1992); *Worrell, supra.*

The administrative law judge's *de novo* decision on the merits of entitlement provides a determination regarding the question of whether a basis for modification has been demonstrated. *Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992). The administrative law judge acknowledged:

> "there is evidence submitted since the time of the prior award of the miner's claim, which, if fully credited, could change the prior administrative result. Therefore, I will proceed to review the claim on the merits, while weighing all of the medical evidence of record.

Decision and Order at 5. However, contrary to employer's brief, there is no indication that the administrative law judge "mechanically granted modification," or actually applied the case law in *Shupink v. LTV Steel Co.*, 17 BLR 1-124 (1992). Employer's Brief at 15. The administrative law judge merely attempted to review the entire record on the merits and his findings, if affirmable, *see infra*, would have been sufficient to satisfy a modification analysis.[2] We therefore hold that in this case it was not necessary for the administrative law judge to make a specific preliminary determination regarding the grounds for modification inasmuch as the modification finding is subsumed in the

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[2] The arguments raised by employer regarding the administrative law judge's misplaced burden of proof on claimant in adjudicating the merits of the claim will be discussed, *infra*.

administrative law judge's findings on the merits of entitlement.

Employer next challenges the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Employer contends that the administrative law judge selectively analyzed the evidence and that his findings fail to comply with the Administrative Procedure Act (APA).[3] Employer argues that the administrative law judge failed to explain his rationale, and, in effect, provided claimant with a presumption of pneumoconiosis because the record contains positive x-ray readings. The administrative law judge summarized all of the 32 interpretations of 14 x-rays of record, and then concluded that 18 were read by Board-certified radiologists or B-readers. The administrative law judge then stated that he was giving more weight to the more qualified readers and the most recent x-ray evidence. Decision and Order at 10. He then discussed all the x-rays and concluded that the more recent positive readings of the March 9, 1994 and September 1, 1994 x-rays were more persuasive than the negative re-readings, without any rationale for this finding. The administrative law judge also found, without any rationale, that the positive reading of the September 6, 1995 x-ray more persuasive than the November 27, 1995 negative readings by two B-readers, one whom [sic] was also a Board-certified radiologist. Decision

[3] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

and Order at 10. The record contains 20 negative interpretations, and all of the readers who read negative x-rays have at least B-reader status while some are dually-qualified. Thus, the administrative law judge's finding is violative of the APA, and he has apparently selectively analyzed the evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). We therefore vacate the administrative law judge's finding at Section 718.202(a)(1), and on remand he must fully explain the findings that he renders in compliance with the APA.

Employer also challenges the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer contends that the administrative law judge failed to consider the substance of the medical opinions, and their corresponding qualitative factors. Moreover, employer contends that it was irrational for the administrative law judge to credit the opinions diagnosing pneumoconiosis over those that did not diagnose pneumoconiosis on the basis of the superior credentials of the physicians, when in fact, they had the same credentials. Employer also contends that the administrative law judge improperly relied upon his x-ray findings at Section 718.202(a)(1), when weighing the medical reports. Employer's contentions have merit.

The administrative law judge accurately summarized the six opinions of record, and concluded that Drs. Miller, Baker, Frank and Kabani opined that claimant had pneumoconiosis while Drs. Broudy and Dahhan concluded that he did not. Decision and Order at 11. He found that the opinions of Drs. Miller, Baker and Frank were well

documented and well-reasoned and accorded more weight to the opinions of Drs. Baker and Frank because they were board-certified in internal medicine and pulmonary medicine. *Id.* Further, the administrative law judge found that Dr. Baker had examined claimant from 1992-1995, and thus had the best overall picture of the claimant's health and was most familiar with his medical condition. He noted that the opinions of Drs. Broudy and Dahhan were adequately documented and that they possessed impressive qualifications, but he chose to discount these opinions because they were "belied by [claimant's] extensive coal mine employment history and the positive x-ray readings." Decision and Order at 11. The administrative law judge accorded less weight to the opinions of Drs. Broudy and Dahhan and found that claimant had established the existence of pneumoconiosis. Inasmuch as we have vacated the administrative law judge's finding that the x-ray interpretations established the existence of pneumoconiosis at Section 718.202(a)(1), we likewise vacate his finding at Section 718.202(a)(4), as it is affected by his x-ray analysis. In addition, Drs. Broudy and Dahhan relied on the same number of years of coal mine employment history as the doctors whose opinions were credited by the administrative law judge. Therefore, it was irrational to give the opinions of Drs. Broudy and Dahhan less weight on this basis. On remand, the administrative law judge must similarly render findings at Section 718.202(a)(4) which comply with the APA.

Employer also challenges the administrative law judge's findings at Section 718.204(c). Employer contends that the administrative law judge again does not comply with the APA, and has not made the requisite *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987) and *Shedlock v.*

Bethlehem Mines Corp., 9 BLR 1-195 (1986) analysis. Employer's contentions have merit. Originally, the administrative law judge incorrectly found that all of the pulmonary function studies and blood gas studies produced qualifying values. Decision and Order at 12. Later, on reconsideration, the administrative law judge recognized that his finding with respect to the blood gas studies was error, as they all were non-qualifying. Order on Motion for Reconsideration at 2. The administrative law judge however failed to weigh together all of the relevant, probative evidence regarding total disability, both like and unlike evidence, as required by *Fields, supra* and *Shedlock, supra*, and instead, he simply stated that the medical evidence supports a finding of total disability. *Id.* Further, when weighing the medical reports, the administrative law judge stated that all six physicians opined that claimant was totally disabled. The record however indicates that although Dr. Frank diagnosed an occupational lung disease caused by coal mine employment, he provides no assessment as to whether claimant is totally disabled. Director's Exhibit 46. Dr. Broudy stated that claimant suffered from a chronic obstructive airways disease which *may* prevent him from doing the work of an underground miner. (emphasis added). Director's Exhibit 45. In addition, the administrative law judge did not discuss that Dr. Dahhan initially opined that claimant retained the respiratory capacity to perform his usual coal mine employment, Director's Exhibit 45; but later concluded that claimant was totally disabled. Employer's Exhibit 2. As employer correctly contends, the administrative law judge must consider the weight accorded to any qualified or inconsistent opinions. *See Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Further, this reweighing of the medical opinions

could affect the weighing required pursuant to *Fields, supra; Shedlock, supra.* We vacate, therefore, the administrative law judge's findings at Section 718.204(c), and on remand instruct him to address the above concerns.

We also find merit in employer's argument that the administrative law judge improperly found that claimant's total disability was due to pneumoconiosis at Section 718.204(b). Although the administrative law judge correctly cites the standard as set forth in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), (claimant must establish that his total disability is due "at least in part" to pneumoconiosis). The administrative law judge found that Dr. Frank attributed claimant's total disability to pneumoconiosis, when, in fact, Dr. Frank's opinion is silent as to whether claimant is totally disabled and fails to cite any source. Director's Exhibit 46. Moreover, the administrative law judge found the opinions of Drs. Baker and Frank to be corroborated by the qualifying pulmonary function studies and blood gas studies of record. Decision and Order at 13. As indicted previously, all of the blood gas studies are non-qualifying, and the administrative law judge did not address this error, but rather, discussed his finding regarding onset date. We vacate, therefore, the administrative law judge's finding pursuant to Section 718.204(b). On remand, the administrative law judge must again apply the standard set forth in *Adams, supra.*

Finally, employer challenges the administrative law judge's finding that the correct date of onset of entitlement is June 1, 1992. Initially, the administrative law judge found that the onset date commenced February 1994, the month that claimant filed his motion for modification. After claimant requested reconsideration, the administrative law judge changed the onset date to commence June

1992, the month in which Dr. Baker's report opined total disability. Employer asserts that it is improper for the administrative law judge to do this, as Dr. Baker's report was initially rejected, and the administrative law judge appears to base his modification findings on a change in condition, and not a mistake of a conclusion of fact. We reject employer's contention, and hold that, as a modification is a *de novo* proceeding, the administrative law judge may determine whether any evidence in the record establishes a correct onset date. *See* 20 C.F.R. 725.310; *Williams v. Director, OWCP*, 13 BLR 1-28 (1989). The administrative law judge, however, does not fully explain his determination to credit Dr. Baker's initial report in 1992 as establishing total disability. In addition, we note that his findings on remand may effect this finding. Therefore, although we reject employer's contention that Dr. Baker's report cannot establish the appropriate onset date, we are compelled to vacate his onset date finding. On remand, the administrative law judge must fully explain his onset date finding in compliance with the APA.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits and the Order on Motion for Reconsideration are affirmed in part, vacated in part, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

s/ _____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

s/ _____
ROY P. SMITH
Administrative Appeals Judge

s/ _____
REGINA C. McGRANERY
Administrative Appeals Judge

U.S. Department of Labor [SEAL]

Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

Date: September 30, 1996

Case No.: 95-BLA-1170

OWCP No.:400-70-2405

In the Matter of

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Claimant

v.

JERICOL MINING, INC.

Employer

OLD REPUBLIC INSURANCE COMPANY

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

ORDER ON MOTION FOR RECONSIDERATION

I issued a Decision and Order – Awarding Benefits in the above entitled matter on May 9, 1996. On May 21, 1996, the claimant's attorney submitted a Motion for Reconsideration. The claimant's motion requests that I reconsider the portion of the Decision and Order that

establishes the onset of disability date as being February 1, 1994.

Claimant's counsel contends that the date of the onset of disability should be May of 1992, the month in which the claimant quit work in part because of his pulmonary problems. That was also the month in which the first qualifying arterial blood gas study was rendered and the month in which Dr. J.D. Miller found that Mr. Napier could no longer work due to his pulmonary impairment.

On August 14, 1996, counsel for the Employer[1] submitted its opposition to the claimant's motion. Counsel for employer argues that since this claim is a request for a modification of a prior denial, something more than just pointing to favorable evidence is required to move back the onset date prior to the date of request for modification. Employer's counsel cites no authority to support this conclusion.

Because Mr. Napier's claim involved a request for modification, the claimant has the opportunity to collect benefits from an onset of disability date preceding the date of the original denial. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1364 (4th Cir. 1996). The modification request of Mr. Napier caused a continuation of the miner's original claim, thereby allowing a date of onset which could potentially precede the date of the modification request. The miner's original claim was filed on March 8,

[1] The Employer's interests at the time of the hearing were represented by Gayle G. Huff, Esquire. A change of counsel has occurred, and the interests of the Employer are now being represented by Mark E. Solomons, Esquire, of Arter & Hadden.

1993. It was denied by the claims examiner on August 8, 1993. The claimant requested modification of that denial on February 8, 1994.

The finding regarding date of onset from my favorable Decision and Order was February 1, 1994, the first day of the month in which the claimant requested modification. The date of onset should be the date in which the claimant first establishes total disability due to pneumoconiosis. If that date cannot be determined, the date of onset should be the filing date of the claim, rather than the request date for modification. That is true unless the miner could not actually establish total disability due to pneumoconiosis until the date of the modification request. Section 725.503(b); *Ridings v. C & C Coal Co, Inc.*, 6 BLR 1-227 (1983); *Carney v. Director, OWCP*, 11 BLR 1-32 (1987).

One basis given by claimant's counsel for changing the date of onset is that the miner had a qualifying blood gas study as early as May 18, 1992. I indeed made this finding in the Decision and Order – Awarding Benefits. However, that finding was erroneous. The discussion of § 718.204(c)(2) should have noted that *none* of the blood gas studies yielded qualifying results, rather than *all* of them. However, it was correct that the pulmonary function studies were qualifying, and the preponderance of the medical opinion evidence supported a total disability finding. Therefore, the ultimate finding that the miner suffers from total respiratory disability is proper.

In the Decision and Order – Awarding Benefits, more weight was afforded to the opinions of Drs. Baker and Frank regarding the cause of the claimant's total disability. Dr. Baker first examined the miner in June of 1992, and Dr. Frank examined him in September of 1992. Dr.

Baker's June 1992 opinion is the first in the record which relates the miner's total disability to his pneumoconiosis and coal mine employment.

Based on my review of the Decision and Order, I agree with claimant's counsel that the onset date should be changed. However, the onset date should be June 1, 1992, and not May 1, 1992, as suggested by claimant's counsel. June of 1992 represents the earliest period that the evidence first establishes total respiratory disability due to pneumoconiosis.

ORDER

The ORDER from the May 9, 1996 Decision and Order – Awarding Benefits is hereby amended to change the commencement date for the payment of benefits to June 1, 1992, rather than February 1, 1994. The remainder of the ORDER remains unchanged.

s/ _____
RUDOLF L. JANSEN
Administrative Law Judge

U.S. Department of Labor

Office of Administrative [SEAL] Law Judges
525 Vine Street
Cincinnati, Ohio 45202

Date: May 9, 1996

Case No.: 95-BLA-1170

OWCP No.: 400-70-2405

In the Matter of

EUGENE NAPIER

Claimant

v.

JERICOL MINING, INC.

Employer

OLD REPUBLIC INSURANCE COMPANY

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Laura J. Clark, Esq.
Harlan, Kentucky
For the Claimant

Gayle G. Huff, Esq.
Harlan, Kentucky
For the Employer

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for black lung benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.*, and the implementing regulations which are located in Title 20 of the Code of Federal Regulations. Regulation section numbers in this Decision and Order are contained in that Title.

Benefits are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis or to qualifying survivors. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation.

This case was referred on March 15, 1995 to the Office of Administrative Law Judges for a formal hearing. A formal hearing was held in Pineville, Kentucky on October 24, 1995, at which all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 Code of Federal Regulations.

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record[1], arguments of the parties, and applicable regulations, statutes and case law. Each exhibit received into evidence, particularly those related to the miner's medical condition, although perhaps not specifically mentioned in this decision, has been carefully reviewed.

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[1] In this decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "TR" refers to the Transcript.

ISSUES

The issues to be decided are:

1. Whether the employer has established a basis for modification under 20 C.F.R. § 725.310 by proving a mistake in a determination of fact or a change in condition;

2. Whether the miner has pneumoconiosis as defined by the Act and regulations;

3. Whether the miner's pneumoconiosis arose out of coal miner employment;

4. Whether the miner is totally disabled;

5. Whether the miner's disability is due to pneumoconiosis; and

6. Whether the miner has six dependents for purpose of augmentation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background

The miner, Eugene Napier, filed his claim for black lung benefits on March 8, 1993, and it was denied by the claims examiner on August 9, 1993. (DX 1; DX 25) The Claimant requested a modification on February 8, 1994. (DX 32) The District Director denied the claim on July 6, 1994. (DX 29) The Claimant requested a hearing on July 13, 1994. (DX 33) The District Director entered an award on January 17, 1995, and the employer, Jericol Mining, Inc., requested a hearing on March 15, 1994. (DX 74).

Mr. Napier was born June 6, 1949, and was 46 years of age at the time of the hearing. (Tr. 11-12) He has a

twelfth grade education and was married to Lynn Middleton Napier. (Tr. 28) He is now divorced and single.

Mr. Napier complains of wheezing, shortness of breath, a tightening cough, and sleeping difficulty. (Tr. 15-16) He suffered a back injury about six years ago and received a state workers' compensation award for that injury. (Tr. 15) He treats with Dr. Kabani, who has prescribed Proventil, Serevent, and Azmacort for his breathing. (Tr. 17) Mr. Napier testified to a history of smoking one package of cigarettes a day for seven years. He then quit for five years and commences [sic] to smoke one cigarette a day in the morning for about seven or eight years. (Tr. 19) He has not smoked for three to four years. I find the claimant to have been a very credible witness.

Coal Miner and Length of Coal Mine Employment

Because the miner worked for a number of years in and around the Nation's coal mines, I find that he was a coal miner within the meaning of 20 C.F.R. §725.202 of the regulations and §402(d) of the Act. The length of the miner's qualifying coal mine employment determines which legal presumptions, if any, apply to the evidence presented. *Gibson v. Director, OWCP*, 1 BLR 1-1016, 1-1018 (1978)

The District Director found 20 years of coal mine employment, and the parties did not contest this finding. (DX 74; Tr. 10, 12) Accordingly, I adopt this finding. Mr. Napier testified that he worked as a repairman and section foreman. (Tr. 13-14, 22, 29) His last job of at least one year was as a repairman. He stated that he was daily exposed to coal dust. (Tr. 13) In his opinion, the exertional requirements of his job were heavy. He fixed anything that

broke down, and this required a lot of lifting – sometimes up to 150 or 200 pounds. He last worked in May 1992 and has not worked at all since. (Tr. 12, 22)

Dependents

The Claimant has claimed six dependents for purposes of augmentation of benefits under the Act – his wife, Lynn Middleton Napier, and five children: Brian Napier (born 9-21-75); Phyllis Gail Burke, a step-daughter (born 2-26-77); April N. Napier (born 4-24-79); Justin L. Napier (born 7-2-84); and David M. Napier (born 12-2-89). (DX 1; DX 11) However, at the hearing, he claimed only five dependents. (Tr. 20) Three of the children live with him but April lives with her mother, the miner's ex-wife. (Tr. 20-21) Mr. Napier ceased paying child support for April when he became disabled, and she now receives Social Security in lieu of child support. (Tr. 21, 28) Phyllis Gail, Justin, and David live with the miner but Phyllis is now eighteen years of age, although she attends college. (Tr. 21) Justin and David are still minors and depend upon Mr. Napier for their support. (Tr. 21) Based on this testimony, as of the time of the hearing, Mr. Napier established the dependency of his ex-wife, Lynn; his daughter April; and his sons, Justin and David.

MODIFICATION

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, provides that upon a miner's own initiative, or upon the request of any party on the ground of a change in conditions or because of a

mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. Section 22 of the Act is to be given a broad interpretation. *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S.254 (1971). Similarly, the language of 20 C.F.R. §725.310 is permissive rather than mandatory. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-15 (1992). The statute vests a fact-finder with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe, supra*; *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). Demonstrating a mistake in a determination of fact does not require submission of new evidence, whereas establishing a change in conditions does require new evidence. *Eifler v. Director, OWCP*, 926 F.2d 663 (7th Cir. 1991); *Cole v. Director, OWCP*, 13 BLR 1-60 (1989); *Wojtowicz, supra*.

The Benefits Review Board has narrowly interpreted the meaning of a "change in condition" to include only those physical changes that occurred between the time of the decision and the time of the request for modification. *See Rizzi v. The Four Boro Contracting Corp.*, 1 BRBS 130, BRB 74-138 (1971). While a change in condition has been construed narrowly, a mistake in a determination of fact has been construed broadly as a basis for modification. The authority to reopen proceedings is generally not limited to any particular type of facts, however, facts are typically the subject of modification proceedings. *Allen v.*

Strachen Shipping Company and Sealand Service, Inc., 11 BRBS 86, BRB 79-276 (1980); *Steele v. Associated Banning Co*, 7 BRBS 501, BRB 77-177 (1978).

The Benefits Review Board has stated the procedure to be followed in determining whether a change in conditions has been established is as follows:

> In determining whether claimant has established a change in conditions, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision.

Napier v. Director, OWCP, 17 BLR 1-111 (1993); *See also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). New evidence is not a prerequisite to modification based on an alleged mistake of fact, but is a prerequisite to modification based upon an alleged change in conditions. *Eifler v. Director, OWCP*, 926 F.2d 663 (7th Cir. 1991); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990); *aff'd on recon.*, 16 BLR 1-71 (1992).

There is evidence submitted since the time of the prior award of the miner's claim which, if fully credited, could change the prior administrative result. Therefore, I will proceed to review the claim on the merits, while weighing all of the medical evidence of record.

MEDICAL EVIDENCE

All of the medical evidence will be summarized:

X-ray reports

EXH. NO.	DATE OF X-RAY	DATE OF READING	Physician/[2] Credentials	CONCLUSIONS
DX 22	4/10/92	6/29/93	Sargent/BCR, B	Negative
DX 24	5/18/92	5/18/92	Miller	1/0; q/p; 6 zones
DX 23	6/17/92	6/17/92	Baker/B	1/0; p/p; 3 zones
DX 46	6/17/92	7/28/92	Vuskovich/B	1/0; p/p; 2 zones
DX 47	6/17/92	10/11/93	Sargent/BCR, B	Negative
DX 46	9/17/92	9/17/92	Lieber/BCR, B	1/0; p/p; 2 zones
DX 45	9/24/92	9/24/92	Anderson/B	0/1
DX 45	9/24/92	9/24/92	Dahhan/B	Negative
DX 45	10/15/92	10/15/92	Broudy/B	Negative
DX 19	5/6/93	5/6/93	Baker/B	1/0; p/p; 3 zones
DX 20	5/6/93	5/25/92	Sargent/BCR, B	Negative
DX 21	5/6/93	6/11/93	Barrett/BCR, B	Negative
DX 45	5/12/93	5/12/93	Dahhan/B	Negative
DX 48	5/12/93	3/2/94	Wiot/BCR, B	Negative
DX 49	5/12/93	3/3/94	Shipley/BCR, B	Negative
DX 59	5/12/93	6/9/94	Wheeler/BCR, B	Negative
DX 51	2/25/94	2/28/94	Halbert/BCR, B	Negative
DX 51	2/25/94	3/7/94	Poulos/BCR, B	Negative
DX 49	2/28/94	2/28/94	Baker/B	1/0; p/p; 3 zones
DX 52	2/28/94	3/22/94	Sargent/BCR, B	Negative
DX 53	3/9/94	3/9/94	Baker/B	1/0; p/q; 3 zones
DX 54	3/9/94	4/5/94	Mathur/BCR, B	1/1; p/s; 6 zones
DX 56	3/9/94	5/25/94	Sargent/BCR, B	Negative
DX 58	3/9/94	6/15/94	Barrett/BCR, B	Negative
DX 60	3/9/94	6/27/94	Goldstein/B	Negative
DX 66	9/1/94	9/1/94	Vaezy/B	1/0; p/s; 4 zones
DX 68	9/1/94	9/19/94	Mathur/BCR, B	1/1; p/s; 6 zones
DX 69	9/1/94	10/2/94	Sargent/BCR, B	Negative
DX 71	9/1/94	10/17/94	Barrett/BCR, B	Negative
CX 2	9/6/95	9/6/95	Baker/B	1/0; p/q; 3 zones
EX 2	11/27/95	11/27/95	Dahhan/B	Negative
EX 1	11/27/95	12/5/95	Wiot/BCR, B	Negative

[2] The following abbreviations will be used in describing the qualifications of the physicians:
BCR - Board-certified radiologist
BER - Board-eligible radiologist
B - B reader

Pulmonary Function Studies

EXH. NO.	DATE	HEIGHT/ AGE	FEV1	FVC	MVV	THREE TRACINGS	COMP./ COOP.
CX 1	10/28/94	69.2"/42	1.49	2.83	30	Yes	----
	Physician: Miller		FEV1/FVC = 53%				
	Found invalid by Ranavaya due to low MVV on 10/9/94 (DX 70)						
DX 13	6/17/92	69.2"/43	1.84	3.73	75	Yes	Poor
	Physician: Baker		FEV1/FVC = 49%				
DX 46	9/14/92	68"/43	1.50	3.08	--	Yes	----
	Physician: Frank		FEV1/FVC = 48%				
	Found valid by Kraman on 8/16/94 (DX 62)						
DX 45	9/24/92	69.2"/43	1.77	4.27	80	Yes	----
	Physician: Dahhan		FEV1/FVC = 41%				
	Found valid by Kraman on 8/16/94 (DX 61)						
DX 45	10/5/92	69"/43	1.95	4.27	78	Yes	----
	Physician: Broudy		FEV1/FVC = 45%				
DX 19	5/6/93	68.5"/43	1.73	3.73	78	Yes	Good
	Physician: Baker		FEV1/FVC = 46%				
	Found valid by Kraman on 5/29/93 (DX 44)						
DX 53	3/9/94	68.5"/43	1.84	3.56	--	Yes	----
	Physician: Baker		FEV1/FVC = 51%				
	Found valid by Kraman on 6/15/94 (DX 57)						
CX 2	9/6/95	68.7"/46	1.78	4.37	78	Yes	Good
	Physician: Baker		FEV1/FVC = 40%				
EX 2	11/27/95	69"/46	1.93	4.99	78.2	Yes	Good
	Physician: Dahhan		FEV1/FVC = 38%				

Blood Gas Studies

EXH. NO.	DATE	PCO2	PO2	PHYSICIAN	INTERPRETATION
DX 15	5/18/92	32	90	Miller	Resting
DX 13	6/17/92	42.4	82.6	Baker	Resting
DX 45	9/24/92	37.7	81	Dahhan	Resting
		32.6	107		Exercising
DX 45	10/5/92	41	86	Broudy	Resting
DX 19	5/6/93	42.7	87.4	Baker	Resting
DX 53	3/9/94	42.4	86.5	Baker	Resting
CX 2	9/6/96	44.1	93.7	Baker	Resting
EX 2	11/27/95	43.5	80	Dahhan	Resting
		38.6	100.2		Exercising

Medical Reports

There are six medical reports of record. The first is a medical report by Dr. J.D. Miller who examined the claimant on May 18, 1992. (DX 15) Based on 20 years of coal mine employment, lastly as a repairman, a medical history, symptomatology, a history of smoking one package of cigarettes per day for five years, then one to two cigarettes per day for thirty years before quitting in 1992, an X-ray, a pulmonary function study, a blood gas study, and a physical examination, he diagnosed pneumoconiosis caused by coal dust exposure. Dr. Miller opined that the miner is unable, from a pulmonary standpoint, to return to his regular coal mining job.

Dr. Glen Baker, who is board certified in internal medicine and pulmonary diseases, examined the Claimant on June 17, 1992, May 6, 1993, March 9, 1994, and September 6, 1995. (DX 16; DX 17; DX 53; CX 2) He also submitted a letter dated November 22, 1994, in which he reiterated his medical opinions as set forth below. (DX 73) Based on 20 years of coal mine employment, lastly as a repairman, a history of smoking one package of cigarettes a day for ten years but quitting several years ago, symptomatology, a medical history, an X-ray, a physical examination, a blood gas study, and a pulmonary function study, Dr. Baker diagnosed pneumoconiosis due to coal dust exposure; chronic obstructive pulmonary disease; chronic bronchitis; and herniated disc. In his opinion, the Claimant has moderate to moderately severe disability due to his coal mine employment and smoking. Dr. Baker further stated that Mr. Napier does not retain the respiratory capacity to perform the work of an underground miner or to do similarly arduous manual labor.

Dr. Arthur Frank examined the miner on September 11, 1992. (DX 46) Based on a history of smoking one package of cigarettes per day for the past ten years, a medical history, symptoms, an x-ray, a pulmonary function study, and a physical examination, he diagnosed coal workers' pneumoconiosis due to coal dust exposure. He opined that due to his coal mine employment, the Claimant is not able to return to his last coal mining job. Dr. Frank is board certified in internal medicine and pulmonary diseases.

Dr. Bruce Broudy, who is board certified in internal medicine and pulmonary diseases, examined Mr. Napier on October 5, 1992. (DX 45) Based on 20 years of coal mine employment, lastly as a repairman, a history of smoking one package of cigarettes per day for six years but quitting in 1992, a physical examination, a medical history, symptomatology, an x-ray, a pulmonary function study, a blood gas study, and an EKG, he found no evidence of pneumoconiosis or impairment due to coal mine employment. Dr. Broudy diagnosed chronic obstructive airways disease and herniated disc both of which were not caused by his coal mine employment. He opined that the miner was not able to return to his regular coal mining job.

Dr. N. Kabani examined the miner on March 14, 1994. (DX 72) Based on a medical history, an X-ray, a blood gas study, and a physical examination, he diagnosed pneumoconiosis caused by coal dust exposure; emphysema; and severe obstructive airways disease. Dr. Kabani opined that the miner is unable, from a pulmonary standpoint, to return to his regular coal mining job.

Dr. A. Dahhan, who is board certified in internal medicine and pulmonary medicine, examined Mr. Napier

on September 24, 1992 and November 27, 1995. (EX 2; DX 45) Based on 20 years of coal mine employment, lastly as a repairman, a history of smoking one package of cigarettes per day for six years but quitting in 1992, a physical examination, a medical history, symptomatology, an x-ray, a pulmonary function study, a blood gas study, and an EKG, he found no evidence of pneumoconiosis or impairment due to coal mine employment. Dr. Dahhan diagnosed chronic obstructive lung disease and herniated disc neither of which was related to his coal mine employment or coal dust exposure. He opined that the miner does not retain the ability to perform his regular coal mining employment due to smoking and allergic diathesis.

Pneumoconiosis, Causation, and Total Disability

Because the Claimant's application was filed after March 31, 1980, the claim will be considered under the provisions of Part 718. In establishing entitlement to benefits, the Claimant must initially prove the existence of pneumoconiosis under §718.202. Since the "true doubt" rule no longer applies to Black Lung claims, the claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994). Pneumoconiosis is defined by the regulations:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis,

> progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

Section 718.202.

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis. Under §718.202(a)(1), a finding of the existence of pneumoconiosis may be based upon x-ray evidence. The record contains a total of 32 interpretations of x-rays taken on 14 separate occasions. Of these readings, 13 were by Board-Certified Radiologists or "B" Readers, whose opinions I assign greater probative weight in determining the existence of pneumoconiosis. *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Eighteen were by Board-Certified Radiologists who are also "B" Readers, whose opinions I assign even greater weight. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). In addition, when weighing x-rays, I give greater weight to the most recent x-rays because pneumoconiosis is a progressive and irreversible disease. *Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989).

Of the x-rays taken in 1992, the May 18, 1992, June 17, 1992, and September 17, 1992 x-rays were found positive. The June 17, 1992 x-ray was confirmed positive by a B-reader, but a board-certified radiologist who is also a B-reader found the x-ray negative. The two most recent x-rays of 1992 were found negative by three B-readers.

Of the x-rays taken in 1993, the May 6, 1993 x-ray was found positive by a B-reader but two duly-qualified interpreters reread it as negative. Furthermore, the May 12, 1993 x-ray was found negative by four B-readers, three of whom are also board-certified radiologists.

Four x-rays were taken in 1994. The February 28, 1994 x-ray was found positive by a B-reader but reread as negative by a duly-qualified reader. The March 9, 1994 x-ray was found positive by a B-reader and confirmed positive by a B-reader who is also a board-certified radiologist. Three B-readers, two of whom are also board-certified radiologists, reread the x-ray as negative. The September 1, 1994 x-ray was found positive by a B-reader and a duly-qualified reader. Two duly-qualified interpreters reread the x-ray as negative. Despite the negative readings of the last two x-rays, I am more persuaded by the positive readings, including those by a B-reader who is also a board-certified radiologist. Thus, I consider the March 9, 1994 and September 1, 1994 x-rays positive for pneumoconiosis.

In 1995, two x-rays were taken. The September 6, 1995 x-ray was found positive by a B-reader and was not reread. The November 27, 1995 x-ray was found negative by two B-readers, one of whom is also a board-certified radiologist. Nevertheless, I find the positive readings of x-rays taken March 9, 1994, September 1, 1994, and September 6, 1995 most persuasive and find that the claimant has established the existence of pneumoconiosis pursuant to §718.202(a)(1).

Under §718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner,

on a biopsy. That method is not available in the instant case because this record contains no biopsy evidence.

Under §718.202(a)(3), a determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§718.304, 718.305, or 718.306. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because it applies only to claims filed before January 1, 1982. *See* §718.305(e). Section 718.306 is only applicable in the case of a deceased miner. Since none of these presumptions is applicable, the existence of pneumoconiosis is not established under §718.202(a)(3).

The fourth and final way in which it is possible to establish the existence of pneumoconiosis under §718.202 is set forth in subparagraph (a)(4) which provides in pertinent part:

> (a) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not Claimant has

established the presence of pneumoconiosis by a preponderance of the evidence. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Even if the x-ray evidence is negative, reasoned medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986).

Drs. Miller, Baker, Frank, and Kabani diagnosed pneumoconiosis, while Drs. Broudy and Dahhan did not. Several factors affect the weight I place on these opinions.

I place more weight on the opinions of Drs. Miller, Baker, and Frank because they are well-documented and well-reasoned. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Drs. Baker and Frank are also board certified in internal medicine and pulmonary medicine, and thus their opinions merit greater weight. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). Dr. Baker examined the miner yearly from 1992 through 1995, and thus had the best overall picture of the claimant's health and was the most familiar with his medical condition. *Schaaf v. Matthews*, 574 F.2d 157, 160 (3d Cir. 1978). Although Drs. Broudy and Dahhan adequately documented their opinions and maintain impressive qualifications, I find that their conclusions of no pneumoconiosis are belied by Mr. Napier's extensive coal mine employment history and the positive x-ray readings. Thus, I place less weight on their opinions and find that the claimant has established the existence of pneumoconiosis pursuant to §718.202(a)(4).

The Claimant must also establish that if he had pneumoconiosis, it arose out of coal mine employment and that he was totally disabled due to pneumoconiosis. Because the claimant established 20 years of coal mine employment, he is entitled to the presumption that his

pneumoconiosis arose out of coal mine employment pursuant to §718.203(b) and the presumption has not been rebutted.

The next step is to determine whether he is totally disabled. Subsection 718.204 sets forth the four methods by which a Claimant may attempt to establish disability. A miner is considered totally disabled if the irrebuttable presumption of §718.304 applies. The presumption is not invoked because there is no x-ray evidence of large opacities classified in Category A, B, or C and no biopsy or equivalent evidence.

Where the presumption of §718.304 does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in §718.204(c), in the absence of any contrary probative evidence. This section requires the weighing of all of the relevant probative evidence, both like and unlike evidence, with the burden of proof always on Claimant to establish total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Under §§718.204(c)(1) and (c)(2), total disability may be established if either pulmonary function or arterial blood gas tests show values which are equal to or less than the values listed in Appendix B or C. All of the nine ventilatory studies and all of the eight blood gas studies of record yielded qualifying values. Therefore, I find that the Claimant has established total disability pursuant to both §§718.204(c)(1) and (2).

Section 718.204(c)(3) is inapplicable in this case because there is no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure.

Under §718.204(c)(4), where total disability cannot be established by weighing the pulmonary function and blood gas study results, any medical evidence showing that the Claimant suffers from cor pulmonale, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted laboratory techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual or comparable employment. There is no medical evidence in the record that the Claimant has cor pulmonale. Although the pulmonary function and blood gas studies do support a total disability finding in this case, I will still analyze the physicians' reports under §718.204(c)(4) to determine whether the Claimant is totally disabled.

All six examining physicians found that Mr. Napier does not retain the pulmonary ability to perform his usual coal mine employment. Since the consensus is unanimous that the claimant is totally disabled, I so find.

Finally, the Claimant must also establish that his disability arose out of coal mine employment. §§718.204(c)(4) and (c)(5). The Sixth Judicial Circuit requires a finding under §718.204(c)(4) that the Claimant's total disability is due not just to a respiratory or pulmonary impairment, but to pneumoconiosis. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). In satisfying that standard, the Sixth Circuit has held that a miner need only affirmatively establish that the totally disabling respiratory impairment is due "at least in part" to pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Dr. Baker opined that the miner's disability is due to pneumoconiosis and smoking. Dr. Frank also attributed the total disability to pneumoconiosis. None of the other physicians ascribed a cause to the disability, although it can be inferred that Drs. Broudy and Dahhan believed a pulmonary problem other than pneumoconiosis caused the disability.

I place greater weight on the opinions of Drs. Baker and Frank because of the underlying objective evidence. Pneumoconiosis was established by both x-ray and medical opinion evidence. All pulmonary function and blood gas studies were qualifying. The miner unquestionably worked in the coal mining industry for an extensive period of time. By comparison, his smoking history was less pervasive. Therefore, I place less weight on the opinions of Drs. Dahhan and Broudy, whose opinions are less aligned with the evidence. Accordingly, I find that the claimant has established that his total disability arose, at least in part, out of his coal mine employment.

ENTITLEMENT

By reason of the foregoing, it is concluded that the Claimant is entitled to benefits. 20 C.F.R. §725.503(b) provides:

> In the case of a miner who is totally disabled due to pneumoconiosis, benefits are payable to such miner beginning with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claimant elected review under Part 727 or this subchapter.

Based upon a review of the evidence contained within this record, I cannot make a finding as to the month of onset of total disability. The review provisions of Part 727 of this subchapter are not applicable to this claim. Therefore, benefits must be made payable commencing with the month during which the request for modification was filed. The request for modification in this case was filed on February 8, 1994. Thus, the Claimant is entitled to benefits commencing as of February 1, 1994.

ORDER

The Employer, Jericol Mining, Inc., is ORDERED to pay:

(A) To the Claimant, all benefits to which he is entitled under the Act augmented by reason of his four dependents described above, commencing February 1, 1994.

(B) To the Claimant, all medical and hospitalization benefits to which he is entitled commencing February 1, 1994, or otherwise provide for such service.

(C) To the Secretary of Labor, reimbursement for any payment the Secretary has made to the Claimant under the Act and to deduct such amounts, as appropriate, from the amount the Employer is ordered to pay under paragraphs (A) and (B) above.

(D) To the Claimant or to the Black Lung Disability Trust Fund, as appropriate, interest at the rate established by Section 6621 of the Internal Revenue Code of 1854. Interest is to accrue thirty days from the date of the initial determination of the District Director's

award. *See Youghiogheny Ohio Coal Co. v. Warren*, 841 F.2d 134 (6th Cir. 1988).

ATTORNEY FEE

An award of attorney's fees for services to the Claimant has not been made in this decision since no application has been filed by counsel. Fifteen days from the date of receipt of the Decision and Order is allowed to Claimant's counsel for the submission of a legal fee application. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties will have 20 days following the mailing date of the application within which to file objections. If no response is received within this 20 day period, the parties will be deemed to have waived any objection to the fee requested.

In preparing the attorney fee schedule, the attention of counsel is directed to the provisions of Regulation §§725.365 and 725.366. In conjunction with each of those regulations and in considering applicable case law, IT IS ORDERED that the fee petition filed in this case shall include each of the following:

1. A complete statement of the extent and character of each separate service performed shown by date of performance;

2. An indication of the professional status (e.g., attorney, paralegal, law clerk, lay representative or clerical) of the person performing each quantum of work and that person's customary billing rate;

3. A statement showing the basis for the hourly rate being charged by each individual responsible for the rendering of services;

4. A statement as to the attorney or other lay representative's experience and expertise in the area of Black Lung law;

5. A listing of reasonable unreimbursed expenses, including travel expenses; and

6. A description of any fee requested, charged, or received for services rendered to the Claimant before any State or Federal Court or Agency in connection with a related matter.

s/ _____
RUDOLF L. JANSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may either make a request for reconsideration of it to this Office or appeal it to the Benefits Review Board *within 30 days* from the date of [sic] this Decision and Order is filed, by filing a Motion for Reconsideration with this office or by filing a Notice of Appeal with the Benefits Review Board, 800 K Street, N.W., Washington, D.C. 20001-8001 (See C.F.R. §§725.479, 725.481). (See also, §725.310).

5 U.S.C. § 556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

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5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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33 U.S.C. § 919(d)

(d) Provisions governing conduct of hearing; hearing examiners. Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code [5 USC §§ 554]. Any such hearing shall be conducted by a [an] administrative law judge qualified under section 3105 of that title [5 USC § 3105].

All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 [enacted Oct. 27, 1972], in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

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33 U.S.C. § 921(c)

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments. Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code [28 USC § 2112]. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The

order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

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20 C.F.R. § 718.104(d)

(d) Treating physician. In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4) Extent of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

Supreme Court U.S.
FILED
DEC 26 2002
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No. 02-834

In The

Supreme Court of the United States

JERICOL MINING INC. and OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

EUGENE NAPIER AND DIRECTOR OF OFFICE WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT EUGENE NAPIER IN OPPOSITION

SIDNEY B. DOUGLASS
Attorney at Law
117 South Second Street
P.O. Drawer 839
Harlan, Kentucky 40831
(606) 573-1985

Counsel of Record for Respondent, Eugene Napier

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Administrative Law Judge's Findings and assessment of the physicians' credibility are rational and are supported by substantial evidence.

2. Whether the Sixth Circuit's treating physician rule violates sections 7(C) and 12 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 556(D), 559, Section 21(B) and (C) of the Longshore Act ("LHWCA"), 33 U.S.C. §§ 921(B), (C) and this Court's law prohibiting per se rules exaggerating the weight that must be accorded certain evidence without a valid reason.

3. Whether the Department of Labor's treating physician rule in 20 C.F.R. § 718.104 is valid but moot in regard to Mr. Napier's claim.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The Petitioner's Petition correctly identifies the Parties. Pet. ii. The Respondent, Eugene Napier, is not a subsidiary or affiliate of a publicly owned corporation.

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BRIEF FOR THE RESPONDENT EUGENE NAPIER IN OPPOSITION

OPINIONS BELOW

The Opinions below are correctly stated in the Petitioner's Petition. Pet. 1.

JURISDICTION

The jurisdiction of the Court is correctly stated in the Petitioner's Petition. Pet. 2.

STATEMENT OF THE CASE

The Respondent, Eugene Napier, is a 53 year old retired coal miner. He worked 20 years in the underground coal mines where he breathed coal dust on a daily basis. Mr. Napier's work in the mines involved strenuous manual labor. Mr. Napier last worked in the coal mines in May of 1992 when he was employed as a repairman by the Petitioner, Jericol Mining, Inc., a Kentucky mine. He has not worked since. Pet. App. 61-62.

After May 1992, Mr. Napier filed a claim for state workers' compensation benefits and on March 9, 1993 filed an application for federal black lung benefits. Mr. Napier suffers from shortness of breath, tightness in his chest and wheezing which limits his physical activities and interferes with his sleeping at night. He has taken a multitude of breathing medications since 1992 and when the proof in this case was taken, he was being prescribed breathing medications: Servent, Proventil and Azmacort by his treating physician, Dr. Kabani. Mr. Napier has a limited

tobacco smoking history. He began smoking in his early 20's and smoked approximately 5-7 years. He then quit for 5-7 years and then smoked 1 cigarette per day with his coffee for approximately 8 years. Pet. App. 61-62.

Following the filing of Mr. Napier's federal black lung claim, the claim was administratively denied. However, following an informal conference, the District Director's Office issued a Proposed Order of Memorandum on June 17, 1995 granting his claim. The employer appealed and the claim was heard by Administrative Law Judge Rudolf Jansen on October 24, 1995. Administrative Law Judge Jansen granted benefits by Decision and Order on May 9, 1996 and upon reconsideration by Order dated September 30, 1996. The employer appealed to the Benefits Review Board who affirmed in part and remanded in part on February 27, 1998. On November 23, 1996, Administrative Law Judge Jansen issued a Decision and Order on Remand-Awarding Benefits which decision was affirmed by Order of the Benefits Review Board on June 28, 2000 and by Order denying reconsideration on December 21, 2000. The employer appealed to the U.S. Court of Appeals for the 6th Circuit who affirmed the decision of the Benefits Review Board in an opinion filed on August 30, 2002. Pet. App. 1. It is from this decision that the Petitioner has filed his Petition for a Writ of Certiorari to the Court.

The medical evidence in this case is naturally contradictory. Although Mr. Napier presented x-ray reports of highly qualified medical readers of x-rays that he had coal workers' pneumoconiosis, the employer obtained more negative x-ray opinions. Pet. App. 65. The claim also included the reports or records of six physicians who actually saw Mr. Napier; four of these physicians, Drs. Baker, Frank, Kabani and Miller, were of the opinion Mr.

Napier had pneumoconiosis. Two physicians, Drs. Broudy and Dahhan, who examined Mr. Napier at the request of the employer were of the opinion Mr. Napier did not have pneumoconiosis. Pet. App. 67-69.

ARGUMENT I

THE ADMINISTRATIVE LAW JUDGE'S FINDINGS AND ASSESSMENT OF THE PHYSICIANS' CREDIBILITY ARE RATIONAL AND ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

This is a substantial evidence case! The Court should deny the Petitioner's Petition for Writ of Certiorari in this case because the findings of the Administrative Law Judge are rational and supported by substantial evidence. *O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 85 S.Ct. 1012 (1965). In support of his claim, Mr. Napier presented x-ray reports of highly qualified medical readers of x-rays who diagnosed him with having coal workers' pneumoconiosis. As is often the case, the employer with its financial resources obtained more negative x-ray readings from qualified physicians. Pet. App. 65. Based on the preponderance of evidence, the Administrative Law Judge found on remand Mr. Napier did not establish pneumoconiosis by x-ray pursuant to 20 C.F.R. § 718.202 (a)(4). Pet. App. 33. However, pneumoconiosis may be proved by means other than an x-ray. This claim includes the records of six physicians who actually saw Mr. Napier. Four of these doctors, Dr. Baker, Dr. Kabani, Dr. Miller and Dr. Frank, were of the opinion Mr. Napier had pneumoconiosis. Dr. Kabani was Mr. Napier's treating physician for a year and a half. Drs. Baker, Frank and Miller were evaluating physicians although Dr. Baker had evaluated Mr. Napier

four times from June 1992 until September 1995. The two physicians who examined Mr. Napier at the request of the employer were Drs. Broudy and Dahhan. Although Dr. Dahhan and Dr. Broudy conceded that Mr. Napier had a disabling respiratory condition, they were of the opinion his pulmonary condition was not related to his coal dust exposure; however, the two physicians did not adequately answer what was the cause of Mr. Napier's pulmonary condition in light of his minimal smoking history. Pet. App. 67-69. The Administrative Law Judge made a credibility determination in finding that the opinions of Drs. Baker, Frank, Kabani and Miller were more persuasive than those of Dr. Broudy and Dr. Dahhan. Pet. App. 73-76 and 33-38.

Mr. Napier has had nine ventitory studies which are qualifying under 20 C.F.R. § 718.204 (c)(1) and which establish he has a disabling respiratory condition. Pet. App. 66. There are no nonqualifying pulmonary function studies of record. Pet. App. 56. Mr. Napier's uncontradicted qualifying pulmonary function studies and his 20 years of coal dust exposure support the medical opinions that he has a disabling respiratory condition related to his coal dust exposure and that he has pneumoconiosis within the meaning of 20 C.F.R. § 718.202 (a)(4).

The Administrative Law Judge's findings that Mr. Napier has pneumoconiosis based upon the opinion of a physician exercising sound medical judgment pursuant to 20 C.F.R. § 718.202 (a)(4), that his pneumoconiosis arose out of his coal mine employment and that his pneumoconiosis is totally disabling are findings supported by Mr. Napier's 20 years of underground coal mine dust exposure history, his minimal tobacco smoking history, his severe and disabling respiratory impairment as established by

qualifying pulmonary function studies and his treatment for pneumoconiosis.

ARGUMENT II

THE SIXTH CIRCUIT'S TREATING PHYSICIAN RULE DOES NOT VIOLATE SECTIONS 7(C) AND 12 OF THE ADMINISTRATIVE PROCEDURE ACT ("APA"), 5 U.S.C. §§ 556(D), 559, SECTION 21(B) AND (C) OF THE LONGSHORE ACT ("LHWCA"), 33 U.S.C. §§ 921(B), (C) AND THIS COURT'S LAW PROHIBITING PER SE RULES EXAGGERATING THE WEIGHT THAT MUST BE ACCORDED CERTAIN EVIDENCE WITHOUT A VALID REASON.

The United States Court of Appeals for the Sixth Circuit annunciated what has been called the treating doctor rule in federal black lung cases in the case of *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993). In *Tussey*, supra, the Court stated that Administrative Law Judges are allowed to give greater weight to treating physicians than to non-treating physicians in federal black lung claims. *Tussey*, has been followed since in the 6th Circuit including Mr. Napier's case herein and, in *Peabody v. Groves*, 277 F.3d 829 (6th Cir. 2002) and *Gray v. Peabody Coal Co.*, 35 Fed. Appx. 138 (6th Cir. 2002). In *Groves* and *Gray*, the employers' counsel herein has petitioned this Court for Certiorari. The Sixth Circuit treating doctor rule does not establish a per se rule nor does it apply an automatic preference for the opinions and records of the miner's treating physician. The Administrative Law Judge is not required to give greater weight to the treating physician's opinion where he found the opinion equivocal.

Griffith v. Director, Office of Workers' Comp., 49 F.3d 184 (6th Cir. 1995). In *Groves*, supra, p. 834, the Court stated the opinions of treating physicians should not always be presumed to be correct but are entitled to be credited and weighed appropriately. In Mr. Napier's case, the Court did not sustain Administrative Law Judge Jansen's finding giving greater weight to Mr. Napier's treating physician, but sustained the Administrative Law Judge findings as supported by substantial evidence including the reports and opinions of Drs. Baker, Frank and Miller. Pet. App. 11, 15-17 and 19.

The Petitioner's Petition for a Writ of Certiorari in this case regarding the treating doctor rule is generated by the Court's decision in *Director v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994), in which the Court held the true doubt rule applied by the Department of Labor and Administrative Law Judges improperly shifted the burden of persuasion to the party opposing the claim and was in conflict with the Administrative Procedures Act that placed the burden of proof on the proponent of the relief sought. The Sixth Circuit's treating doctor rule does not shift the burden of proof to the employer; it can help the coal miner meet his burden. But, the rule can also help the coal company; if the treating doctor is of the opinion the miner does not have pneumoconiosis, the employer gets the same benefit of any preferential weight to be given.

Allowing the Administrative Law Judge the discretion to give greater weight to a treating doctor's opinions is no different than allowing the Department's "regulations adopting additional presumptions. See 20 C.F.R. § 718.301-718.306 (1993)" as the Court found permissible in *Greenwich*, supra, p. 280.

The Sixth Circuit's reasonable and rational consideration of treating physicians' opinions giving deferential weight to those opinions when justified is consistent with the Sixth Circuit's long standing view of treating physicians' opinions in social security disability cases, see *Halsy v. Richardson*, 441 F.2d 1230, 1236 (6th Cir. 1971).

ARGUMENT III

THE DEPARTMENT OF LABOR'S TREATING PHYSICIAN RULE IN 20 C.F.R. § 718.104 IS VALID, BUT THE NEW RULE WAS NOT USED IN THE DISPOSITION OF MR. NAPIER'S CLAIM AND, THEREFORE, THIS ISSUE IS MOOT IN REGARD TO MR. NAPIER'S CLAIM.

Within the past year, the Department of Labor significantly revised its regulations regarding the consideration of medical evidence in federal black lung claims including limiting the number of x-ray reports that may be offered by the Parties and including instruction in regard to weight given to treating doctors. The revised regulation went into effect January 19, 2002 and only applies to evidence developed after that date. The revised regulations are not retroactive. *National Mining Association v. Department of Labor,* 292 F.3d 849 (D.C. Cir. 2002). The revised 20 C.F.R. § 718.104 (d)(5) provides:

> (d) Treating physician. In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer

must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4) Extent of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that

> the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

The above regulation was upheld in *National Mining Association*, supra. p. 870. The above regulation is not arbitrary and capricious; it is a reasonable codification of the prior case law regarding consideration of the treating physicians' opinions.

However, Mr. Napier's claim was not decided under the regulations enacted by the Department of Labor on January 19, 2001; the Department of Labor's new treating doctor regulation was not applied in Mr. Napier's case either by the Administrative Law Judge, the Benefits Review Board or the Sixth Circuit Court of Appeals in injudicating this case.

Therefore, the question of the validity of the revised 20 C.F.R. § 718.104(d) in Mr. Napier's case is moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIDNEY B. DOUGLASS
Attorney at Law
117 South Second Street
P.O. Drawer 839
Harlan, Kentucky 40831
(606) 573-1985

Counsel of Record for
Respondent, Eugene Napier

Supreme Court, U.S.
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No. 02-834

In the Supreme Court of the United States

JERICOL MINING, INC., ET AL., PETITIONERS

v.

EUGENE NAPIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
GARY K. STEARMAN
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the decision of the court of appeals concerning the weight to be accorded the medical opinion of a treating physician in adjudicating a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, is proper and consistent with the allocation of the burden of proof in Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d).

2. Whether the Department of Labor's regulation addressing the opinion of a treating physician, 20 C.F.R. 718.104(d), conflicts with Section 7(c) of the APA or otherwise is arbitrary or capricious or not in accordance with law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 301 F.3d 703. The decisions and orders of the Benefits Review Board (Pet. App. 20-29, 42-53) and the administrative law judge (Pet. App. 30-41, 54-79) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2002. The petition for a writ of certiorari was filed on November 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 9, 1993, respondent Eugene Napier, who had been a coal miner for 20 years, filed a claim for

benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.* Pet. App. 2. The BLBA provides for payment of benefits to "coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a); 20 C.F.R. 718.1. During the administrative consideration of Napier's claim, petitioner Jericol was identified as the coal-mine operator responsible for paying any benefits awarded to him. Pet. App. 2.[1]

a. On May 9, 1996, an administrative law judge (ALJ) awarded Napier benefits. Pet. App. 58-79. The ALJ, relying on x-ray evidence and medical opinion evidence, first determined that Napier suffered from pneumoconiosis. *Id.* at 70-73. The ALJ next found that Napier was totally disabled, based on the opinions of six physicians. *Id.* at 74-75. Finally, the ALJ concluded that Napier's disability was due to pneumoconiosis. *Id.* at 75-76. The ALJ explained that Napier had "worked in the coal mining industry for an extensive period of time," and that, "[b]y comparison, his smoking history was less pervasive." *Id.* at 76. The ALJ thus placed greater weight on the physicians' opinions that found that Napier's disability arose from pneumoconiosis, and less weight on the contrary opinions of Drs. Dahhan and Broudy, who had failed to diagnose pneumoconiosis in the first place. *Ibid.*

b. On February 27, 1998, the Benefits Review Board (Board) remanded the case for further consideration of the evidence. Pet. App. 42-53. The Board vacated the finding that Napier suffered from pneumoconiosis because the ALJ had failed to consider a number of negative x-ray readings and because the ALJ's errors in analyzing the x-ray evidence tainted his analysis of the

---

[1] Jericol's insurer, Old Republic Insurance Co., also is a petitioner in this case.

medical opinion evidence. *Id.* at 47-49 The Board also vacated the ALJ's finding of total respiratory disability, concluding that the ALJ had failed to weigh together all of the relevant respiratory evidence and had misunderstood a number of the medical opinions. *Id.* at 49-50. Finally, the Board vacated the ALJ's finding that Napier's disability was caused by pneumoconiosis, explaining that the ALJ had mischaracterized one physician's opinion and had erroneously relied on "non-qualifying" blood gas tests. *Id.* at 51.

2. On remand, the ALJ again awarded benefits. Pet. App. 30- 41. This time, the ALJ determined that the x-ray evidence failed to establish the presence of pneumoconiosis. *Id.* at 33-34. The ALJ still concluded that Napier suffered from pneumoconiosis, however, based on four of the six medical opinions. *Id.* at 35. The ALJ accorded greatest weight to the opinions of Drs. Baker and Kabani, because Dr. Baker had "extensive experience with Mr. Napier's medical history" and Dr. Kabani was Napier's treating physician. *Ibid.* The ALJ also explained that the four physicians who diagnosed pneumoconiosis had relied at least in part on evidence other than x-ray evidence. *Ibid.*

In determining that Napier was totally disabled, the ALJ relied on the pulmonary function studies, all of which demonstrated total disability. Pet. App. 36. The ALJ also based his determination on the physicians' opinions, of which four found total disability, one found a possibility of total disability, and the remaining one made no finding on the issue. *Id.* at 36-37.

Finally, the ALJ concluded that the total disability was due at least in part to pneumoconiosis. Pet. App. 38. The ALJ placed greater weight on the opinion of Dr. Baker, who found that Napier's disability was caused by both pneumoconiosis and smoking, because of

Baker's "extensive history of examining Mr. Napier." *Ibid.* In the ALJ's view, the opinions of Drs. Broudy and Dahhan—who were silent on the question of causation but who the ALJ assumed would attribute the total disability "to a pulmonary problem other than pneumoconiosis"—were "not consistent with the weight of the objective medical evidence." *Ibid.*

3. On June 28, 2000, the Board affirmed the ALJ's award of benefits. Pet. App. 22-29. The Board rejected petitioners' argument that the ALJ erred in finding the existence of pneumoconiosis through a "mechanical[]" application of "the treating physician preference." *Id.* at 25. In the Board's view, the ALJ had permissibly accorded more weight to the opinions of Drs. Baker and Kabani because their examinations and treatment of Napier afforded them greater familiarity with his medical condition. *Id.* at 25-26.

The Board also upheld the ALJ's finding of total respiratory disability, ruling that the ALJ had correctly interpreted and weighed the medical opinions. Pet. App. 26-27. Finally, on the question of causation, the Board found that the ALJ had not erred in according greater weight to Dr. Baker's opinion, because Dr. Baker "had an extensive history of examining the miner" and his opinion "was supported by the medical evidence of record." *Id.* at 28. Moreover, the Board observed, the ALJ permissibly discounted the opinions of Drs. Broudy and Dahhan because they were based on the "faulty underlying premise" that Napier did not suffer from pneumoconiosis. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-19. The court first addressed petitioners' argument the ALJ "improperly relied upon an automatic presumption that a physician's opinion is entitled to greater weight if that physician has treated the claimant." *Id.* at 8. The

court explained that its previous decisions had "rejected the contention" that an ALJ is required "to give absolute deference to the opinion of a treating physician." *Id.* at 9. Instead, the court observed, ALJs are "to examine the medical opinions of treating physicians on their merits" and are to "make a reasoned judgment about their credibility." *Ibid.* (quoting *Peabody Coal Co.* v. *Groves*, 277 F.3d 829 (6th Cir. 2002), cert. denied, No. 02-249 (Jan. 13, 2003)). The court looked for guidance to the Secretary of Labor's recently promulgated regulation addressing the proper weight to be given the opinion of a treating physician, 20 C.F.R. 718.104(d), which the court regarded as instructive although not directly applicable because it became effective only for evidence developed after January 19, 2001. Pet. App. 9. The court quoted a provision of the regulation stating that a treating physician's opinion "may" be given "controlling weight" in "appropriate cases" depending on the opinion's "credibility * * * in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. 718.104(d)(5); Pet. App. 9-10. That framework made clear, the court explained, that petitioner was "mistaken both in its belief that an automatic treating-physician presumption exists and in its position that the opinion of a treating physician is never entitled to added weight." *Id.* at 10.

Applying those standards, the court concluded that the ALJ had erred in giving extra weight to the opinions of Napier's treating physician, Dr. Kabani, and the physician who examined Napier on the greatest number of occasions, Dr. Baker. Pet. App. 10-14. The "only explanation given by the ALJ for attaching greater significance to [Dr. Kabani's] views was that she served as Napier's treating physician," the court explained, and "the record is silent as to the factors that

are relevant in determining whether her opinions as Napier's treating physician are entitled to greater weight, considerations such as the nature and duration of the relationship, as well as the frequency and extent of the treatment." *Id.* at 10-11. Moreover, the court emphasized, the record contained no documentation or results of tests performed by Dr. Kabani supporting her opinions. *Ibid.*

As for Dr. Baker, the court explained, there was no material difference in the duration and nature of Dr. Baker's and Dr. Dahhan's examinations of Napier—both had examined Napier over the same four-year period and had developed and considered the same sorts of evidence. Pet. App. 12-13. The court found it insignificant that Dr. Baker had examined Napier more frequently over the course of the four-year period, because "nothing in the record supports a conclusion that Dr. Baker's additional examinations gave him a more thorough understanding of Napier's condition." *Id.* at 13. Placing unwarranted reliance on the frequency of examinations, the court cautioned, would enable a claimant to regularly visit a physician who provided a favorable diagnosis and then argue that the opinion of that physician was entitled to an automatic preference. *Id.* at 13-14.

Although the court concluded that the ALJ had erred in according greater weight to the opinions of Drs. Kabani and Baker based solely on the treating-physician relationship and the frequency of examinations, the court affirmed the ALJ's decision on the ground that it was nonetheless supported by substantial evidence. Pet. App. 14-19. The court disregarded the ALJ's reliance on the opinion of the treating physician, Dr. Kabani, "due to the lack of supporting documentation." *Id.* at 16. In the court's view, however, the "record

* * * support[ed] the ALJ's determination to credit the opinions of Dr. Baker, Dr. Frank, and Dr. Miller." *Ibid.* Credibility determinations were for the factfinder to make, the court explained, and the ALJ had discussed the evidence supporting the opinions of those physicians as well as the contrary evidence. *Ibid.* And although the ALJ had erred in attaching additional weight to Dr. Baker's opinion based solely on the frequency of examinations, the court reasoned, that did "not alter the fact that the ALJ was entitled to find that other factors, based on the objective record, made Dr. Baker's views more credible than those of Dr. Broudy and Dr. Dahhan." *Id.* at 16-17. The court recounted the ALJ's discussion of the evidence relied upon by Drs. Baker, Frank, and Miller (other than x-ray evidence), such as pulmonary studies, Napier's medical history, physical examinations, and a spirometry. *Id.* at 15-16.

ARGUMENT

Petitioners seek this Court's review of both the court of appeals' discussion concerning the opinion of a treating physician in BLBA adjudications and the Department of Labor's new regulation addressing treating physicians' opinions. Review of petitioners' claims is not warranted. As petitioners acknowledge (Pet. i n.1), *Peabody Coal Co.* v. *Groves*, cert. denied, No. 02-249 (Jan. 13, 2003), which also arose from the Sixth Circuit, raised the same two questions presented by the petition in this case. The Court denied the petition for a writ of certiorari in *Groves*, and there is no reason for a different result here.[2]

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[2] The same questions are also raised by the petition in *Peabody Coal Co.* v. *Gray*, petition for cert. pending, No. 02-585 (filed Oct. 17, 2002).

1. Petitioners contend (Pet. 2-3) that the Sixth Circuit "requires the adjudicator to accord more weight to the opinion of a treating doctor," and (Pet. 10) that the court's approach conflicts with the allocation of the burden of proof in Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d), by "shift[ing] the burden of persuasion on the credibility of claimant's medical evidence." Those contentions lack merit and do not warrant this Court's review.

a. Because the Sixth Circuit below agreed with petitioners that the ALJ erred in according greater weight to the treating physician's opinion based solely on the fact of the treatment relationship, petitioners' contentions concerning the Sixth Circuit's approach to the opinion of a treating physician are not properly presented for review in this case. The opinion below explains that there is no automatic presumption in favor of a treating physician's opinion, and that a treating physician's opinion may be entitled to greater weight in a particular case if warranted by the evidence in the record and by the opinion's documentation and reasoning. Pet. App. 9-10. Here, the court of appeals concluded, the ALJ had erred in giving greater weight to Dr. Kabani's opinion based solely on her status as the treating physician, in the absence of any record evidence concerning the nature and duration of the relationship or any documentation or tests performed by her that supported her opinion. *Id.* at 10-11. The court thus discounted Dr. Kabani's opinion entirely in assessing whether the ALJ's decision was supported by substantial evidence. *Id.* at 16. Because the court resolved the questions concerning the role of the treating physician's opinion in petitioners' favor, and because Dr. Kabani's opinion played no role in the court's decision to affirm the ALJ's decision, petitioners' contentions con-

cerning the weight to be accorded the opinion of a treating physician are not properly presented for review.[3]

b. Petitioners err in contending (Pet. 9-10) that the Sixth Circuit regards a treating physician's opinion as a "tie-breaker" or "makeweight" and requires the ALJ to "give more weight to the treating doctor for no particular reason." The decision below makes clear that the opinion of a treating physician, if adequately documented and supported, *may* be entitled to greater weight in a particular case where justified by the record, because the treatment relationship might afford the physician superior insight into the claimant's condition. Pet. App. 8-11. But where the treating physician's opinion is not entitled to added weight, the opinion does not serve as a "tie-breaker" or "makeweight" —indeed, as in this case, it might receive no weight at all. See *id.* at 16.

Contrary to petitioners' assertion (Pet. 11), the approach of the Sixth Circuit is consistent with the approach adopted by other courts of appeals. The courts of appeals, including the Sixth Circuit, are in agreement that there is no automatic presumption favoring the opinion of a treating physician, but that the treating physician's opinion, if adequately documented and supported, may be entitled to controlling weight where justified by the record and the specific circumstances of the treatment relationship. Thus, the

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[3] The court of appeals also ruled that the ALJ had erred in according additional weight to the opinion of Dr. Baker based solely on the number of times that he had examined Napier. Pet. App. 11-14. Accordingly, insofar as petitioners seek to raise arguments concerning an "examining physician preference" (Pet. 9) in addition to a treating physician preference, those arguments likewise are not properly presented for review in this case.

D.C. Circuit, in reviewing the decisions of the courts of appeals, found a "consensus among [the] courts * * * that an agency adjudicator may give weight to the treating physician's opinion when doing so makes sense in light of the evidence and the record, but may not mechanistically credit the treating physician solely because of his relationship with the claimant." *National Mining Ass'n (NMA)* v. *Department of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002) (per curiam); Pet. App. 10 (quoting *NMA*). In concluding that the courts of appeals agree in their approach to the opinions of treating physicians, the D.C. Circuit relied on the same decisions relied on by petitioners. See 292 F.3d at 861-862 (discussing *Sterling Smokeless Coal Co.* v. *Akers*, 131 F.3d 438 (4th Cir. 1997); and *Peabody Coal Co.* v. *McCandless*, 255 F.3d 465 (7th Cir. 2001)); Pet. 11.

c. Petitioners submit (Pet. 10) that the Sixth Circuit's approach to the opinion of a treating physician violates Section 7(c) of the APA, 5 U.S.C. 556(d), and *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267 (1994), by shifting the burden of persuasion from the claimant to the adverse party. That contention lacks merit. Section 7(c) of the APA states that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). In *Greenwich Collieries*, this Court found that the "true doubt" rule—a rule requiring resolution of Black Lung adjudications in favor of the claimant if the evidence was evenly balanced—shifted the burden of persuasion in violation of Section 7(c) of the APA.

Whereas the true doubt rule at issue in *Greenwich Collieries* relieved the claimant of the burden of persuasion to establish eligibility by a preponderance of the evidence, see 512 U.S. at 272, 281, the Sixth Circuit's approach to a treating physician's opinion does not

entail any burden-shifting presumption. The issue in this case about a treating physician's opinion concerns what weight the ALJ may attach to such an opinion when considered with other evidence in the record. The ALJ may award benefits only if the ALJ finds that the claimant has established eligibility by a preponderance of the evidence, after weighing all of the relevant evidence, including the treating physician's opinion.

The Sixth Circuit made clear in its opinion below that no "automatic treating-physician presumption exists," Pet. App. 10, and that there thus is no reallocation of the claimant's burden of persuasion. *Id.* at 7, 10-12; cf. *NMA*, 292 F.3d at 870 (the Department's codification of the rule does not "reliev[e] claimants of the burden of proving both pneumoconiosis and the credibility of the doctor's opinion"). That burden instead remains with the claimant, who is entitled to an award of benefits only if the weight of medical evidence supports a finding that the miner suffers from pneumoconiosis, that the miner is totally disabled, and that the total disability is due to pneumoconiosis. See Pet. App. 7. Although a well-reasoned and documented opinion of a treating physician familiar with the miner's medical condition over a period of time can contribute to the claimant's proof and result in an award of benefits, the treating physician's opinion does not trump other medical opinions that are better reasoned or documented. Moreover, giving effect to the opinion of a treating physician can work *against* the claimant if the treating physician concludes that pneumoconiosis did not exist or did not cause total disability. The Sixth Circuit's approach to a treating physician's opinion, accordingly, does not shift the burden of proof in violation of Section 7(c) of the APA.

d. The Sixth Circuit's decision does not warrant review for the added reason that, in BLBA cases in which the evidence was developed after January 19, 2001, the weight to be accorded the opinion of a treating physician is governed by the Department of Labor's treating-physician regulation, 20 C.F.R. 718.104(d). The regulation requires the adjudication officer to "take into consideration" a number of specific factors "in weighing the opinion of the miner's treating physician" —*viz*, the "[n]ature of relationship" between the physician and the miner in respect to whether the physician "treated the miner for respiratory or pulmonary conditions," the "[d]uration of [the] relationship," the "frequency of physician-patient visits," and the "types of testing and examinations conducted during the treatment relationship." 20 C.F.R. 718.104(d)(1)-(5). The regulation provides that, "[i]n appropriate cases, the relationship between the miner and his treating physician *may* constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight," but only "provided that the weight given to the [physician's] opinion * * * shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. 718.104(d)(5) (emphasis added). The regulation does not effect "an evidentiary presumption which shifts the burden of production or persuasion." 65 Fed. Reg. 79,934 (2000); see *NMA*, 292 F.3d at 870. Because the regulation will govern in all BLBA cases in which the evidence was developed after January 19, 2001, any flaw in the Sixth Circuit's approach in this case—and any disagreement between the opinion below and the decisions of other courts of appeals—is of little (and diminishing) continuing significance.

2. Petitioners also suggest (Pet. i) that review is warranted to address whether the Department's treating physician regulation, 20 C.F.R. 718.104(d), is arbitrary and capricious and is in conflict with Section 7(c) of the APA. There is no basis for reviewing the regulation in this case. As the court of appeals correctly observed, Pet. App. 9, the regulation does not apply to respondent Napier's claim for benefits. Instead, it applies only in cases in which the evidence was developed after January 19, 2001. 20 C.F.R. 718.101(b). Although the court of appeals discussed the regulation when describing the proper weight to be accorded the opinion of a treating physician, Pet. App. 9-10, the court understood that the regulation does not govern the resolution of the benefits claim in this case. There thus is no basis in this case for reviewing the regulation's validity.[4]

In addition, there is no disagreement among the courts of appeals on the validity of the regulation under the APA. The D.C. Circuit upheld the regulation against a facial challenge, *NMA*, 292 F.3d at 870-871, and no court has reached a contrary conclusion. The regulation's application in a particular case has yet to be reviewed by any court of appeals.[5]

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[4] For the reasons explained in the government's brief in opposition (at 12-16) in *Peabody Coal Co.* v. *Groves*, *supra* (No. 02-249), moreover, there is no merit to petitioners' suggestion that the treating physician regulation is arbitrary and capricious or inconsistent with Section 7(c) of the APA.

[5] There is no need to hold the petition in this case pending the Court's disposition of *Black & Decker Disability Plan* v. *Nord*, cert. granted, No. 02-469 (Jan. 10, 2003). The Ninth Circuit in that case held that an ERISA plan administrator must accept the conclusion of a treating physician unless the administrator gives specific and legitimate reasons for rejecting the treating physi-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

HOWARD M. RADZELY
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
GARY K. STEARMAN
Attorney
Department of Labor

FEBRUARY 2003

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cian's opinion based on substantial evidence in the record. *Nord* v. *Black & Decker Disability Plan*, 296 F.3d 823, 830 (9th Cir. 2002). This Court granted review in *Nord* to address whether a treating physician presumption governs the administration of disability benefits under ERISA. Respondent Napier's claim for benefits in this case arises under the BLBA, not ERISA. In BLBA adjudications, as explained, there is no automatic presumption in favor of a treating physician's opinion; and the court of appeals in this case gave no weight to the opinion of the treating physician, Dr. Kabani.

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In The

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JERICOL MINING INC. and OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

EUGENE NAPIER and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
Suite 500
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 553-2361

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners Jericol Mining Inc. and Old Republic Insurance Company respectfully submit this supplemental brief to request that the Court hold their petition for a writ of certiorari in abeyance pending the Court's decision on the merits in *Black & Decker Disability Plan v. Nord*, No. 02-469 ("*Nord*"). The decision in *Nord* is highly likely to be dispositive of the matters presented here. The relief requested by this motion is warranted and appropriate for the reasons that follow:

1. In this case, the Sixth Circuit affirmed an award of benefits to Eugene Napier under the Black Lung Benefits Act. 30 U.S.C. §§ 901-945. The Administrative Law Judge ("ALJ") awarded benefits relying principally on the opinion of a physician who treated the claimant. App. 35. The decision was affirmed by the Department of Labor's Benefits Review Board in substantial reliance on the Sixth Circuit's earlier opinion mandating extra weight for treating doctors. App. 26, 28.

2. On appeal, the Sixth Circuit held that the ALJ did not have a proper basis for according more weight to Napier's treating physician, noting that its rule was not automatic and had been applied erroneously. The court nevertheless affirmed the award of benefits on the ground that it was supported by substantial evidence. It was not, however, evidence that controlled the ALJ's decision; it was a treating doctor preference or presumption. Here, substantial evidence review was inappropriate and its invocation to affirm a blatant treating doctor preference is simply a clever device to approve the preference while denying having done so.

3. On January 10, 2003, this Court granted a writ of certiorari in *Nord*. The question presented in *Nord* is: "Whether the Ninth Circuit erred in holding that an ERISA disability plan administrator's determination of disability is subject to the 'treating physician rule' and, therefore, the plan administrator is required to accept the treating physician's opinion of disability as controlling unless the plan administrator rebuts that opinion in writing based upon substantial evidence on the record." The petition in this case challenges the Sixth Circuit's application of a treating physician rule in federal black lung benefits claims.

4. Both the ERISA rule and the black lung rule require the fact finder to give preferential treatment, if not controlling weight, to a benefit applicant's treating doctor solely because of the physician's status. Both rules originate in SSA disability benefit claims arising in several circuits that accorded extra weight to a treating doctor in determining a claimant's entitlement or degree of disability. *Compare Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1138-39, 1143-44 (9th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3001 (U.S. June 13, 2002) (No. 01-1840) ("We see no reason why the [SSA] treating physician rule should not be used under ERISA") *with Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993) (citing SSA claims determinations as authority for holding "it is clearly established that opinions of treating physicians are entitled to greater weight. . . ."). Moreover, on January 22, 2003, the Sixth Circuit joined the Ninth Circuit in mandating a treating physician rule for ERISA disability claims, citing its decision in *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3474 (Jan. 13, 2003)

(U.S. No. 02-249), *petition for reh'g pending*, as the only Sixth Circuit authority for doing so. *Darland v. Fortis Benefits Insurance Co.*, ___ F.3d ___, 2003 WL 141620 at *15 (6th Cir. Jan. 22, 2003).

5. Neither the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, nor the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, authorizes a treating doctor rule. In both ERISA and black lung claims, the courts that accept a treating doctor preference rely on a judicially created and unsubstantiated assumption that by having a treating relationship with the patient a treating doctor acquires significant knowledge not knowable by other experts. *See Darland*, 2003 WL 141620 at *16, *quoting Regula*, 266 F.3d 1130.

6. Although the black lung cases[1] raise additional issues under the Administrative Procedure Act, 5 U.S.C. §§ 551-59 ("APA"), and challenge the Department of Labor's adoption of a new treating doctor regulation, there is no meaningful difference between the ERISA rule the Court has elected to review and the black lung rule. The DOL regulation is not supported by science, but is premised on the SSA rule. *See* 65 Fed. Reg. 79931-34 (Dec. 20, 2002). The regulation, therefore, like the Sixth and Ninth Circuit ERISA rules, rests solely on the authority and intellectual force of the SSA rule. The APA issue arises

[1] Three black lung cases challenging the Sixth Circuit's application of a treating doctor rule have been petitioned to this Court including this case, *Peabody Coal Co. v. Groves*, No. 02-249 and *Gray v. Peabody Coal Co.*, 35 Fed. Appx. 138 (6th Cir. 2002) (unpublished), *petition for cert. filed*, 71 U.S.L.W. 3319 (U.S. Oct. 17, 2002) (No. 02-585). A similar request is being made in *Gray*.

because the treating doctor rule artificially exaggerates the significance of certain evidence in a manner that has been disapproved by this Court in APA adjudications. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998). Whether or not the APA applies, however, the black lung rule shares much common legal ground with the ERISA rule and is predicated upon an identical rationale.

7. In opposition to the petition, the U.S. Department of Labor again presses the untenable theory that the circuits agree that a treating doctor rule is appropriate for black lung claims and that a treating doctor rule was not the basis for the Sixth Circuit's decision here. It is hard to dispute the circuit disagreement following the Fourth Circuit's decision in *Consolidation Coal Co. v. Held*, 314 F.3d 184 (4th Cir. 2002). In *Held*, the majority expressly refuses to accord weight for status to a treating doctor, while the dissent argues for application of the Sixth Circuit's approach in *Jericol*, 314 F.2d at 187-188, 189. The Fourth Circuit has no illusions about the Sixth Circuit's application of a treating doctor rule in this case. DOL's argument that no treating doctor rule was applied simply partners the agency with the Sixth Cirucit in efforts to enforce the rule *per se* while denying having done so.

8. Finally, there is considerable urgency in having the black lung treating doctor issue resolved expeditiously. Although acceptance of a treating doctor rule predicts substantial disruptions for employee benefit plans, significant disruptions already have occurred for coal mine operators and their insurers as a result of the black lung treating doctor rule. Basic insurance rates for smaller mine operators have increased by at least 200% in significant part in anticipation of a widespread treating doctor rule. *See Groves*, Petition for Certiorari at 28 nn. 20-21.

Unrefuted actuarial studies predict substantial increases in benefits and medical costs for employers and insurers as well. *Id.* The treating doctor preference touches on all medical eligibility criteria in black lung claims and is, therefore, the principal cost driver for these increases. *Id.*, nn. 19, 20.

9. Jericol Mining and Old Republic should not be required to pay black lung benefits solely as a result of a rule that is invalid for ERISA cases, should that be the result in *Nord*. Nor should these petitioners have their rights extinguished prematurely in this case.

It is, therefore, respectfully requested that this Court delay consideration of this petition for a writ of certiorari until a decision is issued in *Nord*.

Respectfully submitted,

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 533-2361